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EDITOR
EDWARD JENKS.

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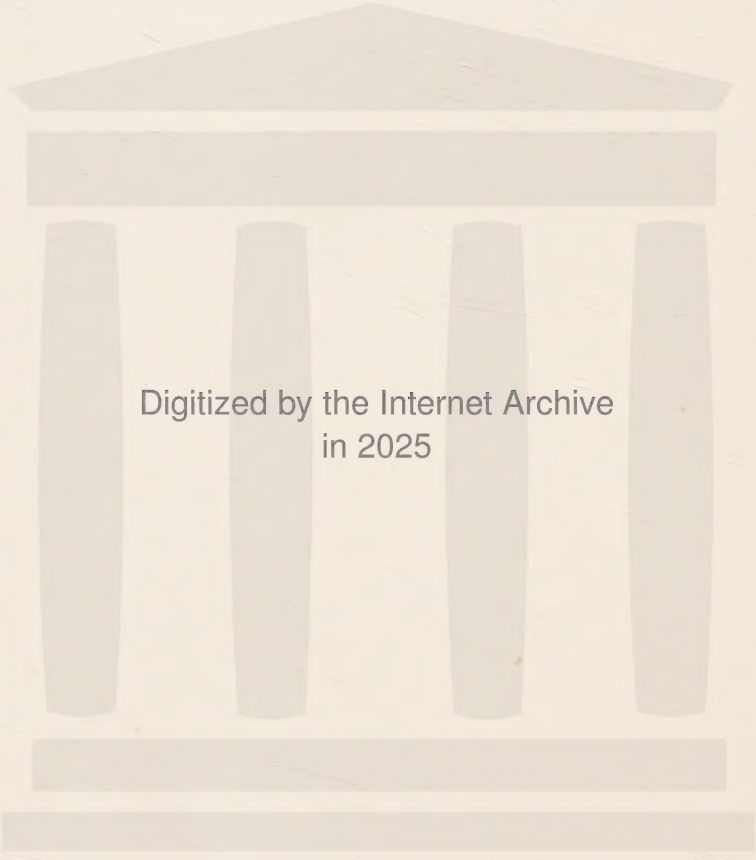
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A DIGEST

OF

ENGLISH CIVIL LAW

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BOOK III

SECTIONS III–XII

LAW OF PROPERTY (*continued*)

BY

EDWARD JENKS

LONDON

BUTTERWORTH & CO.

BELL YARD, TEMPLE BAR

Law Publishers

BOSTON, U.S.A., THE BOSTON BOOK CO.

1913

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9 Old Square, Lincoln's Inn, W. C., London, England

THE UNIVERSITY PRESS, CAMBRIDGE, U.S.A.

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PREFACE

THE hope expressed in the Preface to the preceding volume, that the present volume would complete the Law of Real Property, has been more than realized. For, as will be seen by a glance at the Table of Contents, the present volume also includes the law relating to chattels corporeal. The expectation of its early appearance has also been realized.

There seems to be nothing very special to remark upon in the contents of this volume; except, perhaps, the extraordinary disproportion in bulk between the Law of Real Property and the Law of Chattels Corporeal. Whilst the former occupies, approximately, 500 paragraphs, the latter is stated in less than 70. It is well-known, of course, that much of the law affecting chattels is regarded by English jurists as belonging to the domains of Contract and Tort, previously explored; and it is not always so fully recognized, that some parts of the Law of Real Property, e. g. those dealing with Powers of Appointment and Mortgages, have been appropriated by the Law of Chattels. Still, the difference in bulk, after all allowances, is striking; and, in the opinion of the writer, it is not entirely due to historical accident.

The next volume will commence with the difficult subject of Choses in action, and then proceed to state the comparatively few rules common to all kinds of property. After

dealing with the small but difficult subject of Co-ownership, Book III (Property) will conclude with a brief statement of the Law of Trusts. Possibly it may be found feasible to include also in the volume a portion of the small Book on Family Law.

London, May, 1913.

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ERRATA AND ADDENDA IN PRECEDING VOLUMES

Page 39, § 91. Add: "It will be no defence that the money has been *bonâ fide* applied by the recipient in discharge of his duty; unless the recipient is an agent who has paid the money to his principal."

Baylis v. *B. of London* [1913] 1 Ch. 127.

Page 40, § 92 n. Add: "Charity is no justification of Champerty."

Cole v. *Booker* (1913), XXIX T. L. R. 295.

Page 45, § 107. The Conveyancing Act, 1881, s. 39, has now been repealed and replaced by s. 7 of the Conveyancing Act, 1911, which slightly increases the powers of the Court.

Page 202, § 447. Add a reference to the Money-lenders Act, 1911.

Page 260. Add new § 581[A]:—

"A carrier by land, as well as a carrier by sea, may sell the goods entrusted to him for carriage, in case of necessity, to prevent deterioration, when there is no practical possibility of obtaining the instructions of the owners of the goods."

Sims v. *Midland Ry. Co.* (1912) 82 L. J. K. B. 67.

Page 267, § 599, line 5. For "I," read "II."

Page 337, § 740. Substitute for this par. the following, rendered necessary by recent decisions:—

"Where relief is claimed against different persons on substantially the same facts, such persons may be joined as defendants in the same action, and sued

Remedy

1361. Where the happening of the condition renders the holder of the estate liable to be deprived of it entirely, and no other person is for the time being entitled to the possession or receipt of the profits of the land, the person entitled to enforce the condition may peaceably re-enter, or recover possession by an action in the nature of Ejectment.

Bk. II, Pt. III, Sect. II, Tit. II, *ante*.

Waiver

1362. The benefit of a condition may always be waived;[a] but the actual waiver of the benefit of any condition in any lease, on the part of the lessor, in any one particular instance, is not deemed to extend to any instance other than that to which it specially relates, unless an intention to that effect shall appear.[b]

(a) This was doubtful at one time; and Coke thought (Co. Litt., 214 b) that the breach of a condition annexed to a lease for years, if appropriately worded, might *ipso facto* determine the lessee's estate. But the text expresses the modern view.

(b) Law of Property Amendment Act, 1860, s. 6.

[This section is not very happily worded; but it has been thought better to follow the language of the statute. It will be observed that the section applies only to waivers (a) of forfeitures of 'leases,' (b) by lessors.]

Licence

1363. A licence to do an act which, but for such licence, would create a forfeiture under a condition reserved in any lease, will, if given to the lessee or

assignee of the lease, extend only to the specific act contemplated by the person giving the licence, and will not (unless otherwise specified in the licence) prejudice any proceeding for any subsequent breach.

Law of Property Amendment Act, 1859, s. 1.

Co-owners

1364. A licence to one of several lessees or co-owners of property comprised in a lease, to do any act prohibited to be done without licence, will not operate to destroy a right of re-entry in respect of any breach by his co-lessees or co-owners, or in respect of any breach by him in respect of any interest in such property not the subject of such licence.

Ibid. s. 2.

[The three preceding §§ represent enactments rendered necessary by the existence of the strict rule of the common law, to the effect that a condition was 'indivisible,' i. e., once broken or dispensed with, was gone altogether (*Dumpor's Case* (1603) 4 Rep. 119 b; *Fox* v. *Whitchcocke* (1614) 2 Bulstr. 290). The rule caused extreme inconvenience in practice, and worked harshly against the very persons whom it was intended to protect. It will be observed, that the statutory relaxations apply only to 'leases,' which probably includes grants of life estates.]

Perpetuities

1365. Conditions are subject to the Rule Against Perpetuities (*post*, Sect. XV, Tit. III, and *ante*, Sect. I, Tit. VIII, § 1181).

Hollis Hospital Trustees' and Hague's Contract [1899] 2 Ch. 540.
Re Da Costa [1912] 1 Ch. 337.

Alienation

1366. The benefit of a condition in respect of future,[a] and, in the case of leases, (*semble*) past breaches,[b] may be disposed of by testament,[c] or deed.[d]

(a) *Hunt* v. *Bishop* (1853) 8 Exch. 675.
Hunt v. *Remnant* (1854) 9 Exch. 635.
Jenkins v. *Jones* (1882) 9 Q. B. D., at p. 131, *per* Jessel, M. R.
(b) Conveyancing Act, 1911, s. 2. (The Act is prospective only; and only applies to conditions passing with the reversion and enforceable for the benefit of the reversioner.)
(c) Wills Act, 1837, s. 3.
(d) Real Property Act, 1845, s. 6.

Severance

1367. Subject to Sect. I, Tit. VI, § 1146 (severance of reversions on leases), the severance, by act of the person in whose favour the benefit of the condition is reserved, of the interest to which such benefit is annexed, between two or more persons, whether as co-owners or otherwise, destroys the condition.[a] This rule does not apply to severance by operation of law,[b] nor to severance caused by the wrongful act of the person against whom the forfeiture is sought to be enforced.[c]

(a) *Leeds* v. *Crompton* (1586) in 4 Rep., at 120 a.
Dumpor's Case (1603) 4 Rep., at 120.
(b) *Dumpor's Case*, *ubi sup.*
Moodie v. *Garnon* (1616) 1 Rolle Rep., at p. 331.
(c) *Knight's Case* (1585) Moo., at p. 203.

[The reason for the rule is said to be, that he who enters for condition broken, ought to be in of the same estate which he had at the time of the condition created (*Dumpor's Case*, *ubi sup.*).]

Relief (rent)

1368. When a lessor is proceeding to enforce, or has enforced, a condition of re-entry on non-payment of rent, the Court may, at any time before the lapse of six months after the premises have been recovered in ejectment by the lessor, grant relief and restoration to the lessee or an under-lessee, on payment by such lessee or under-lessee of arrears of rent, interest, and costs.

Common Law Procedure Act, 1852, ss. 210, 212; 1860, ss. 1, 2.
Howard v. *Fanshawe* [1895] 2 Ch. 581.
Humphreys v. *Morten* [1905] 1 Ch. 739.

[No new lease is necessary (*Howard* v. *Fanshawe*, *ubi sup.*).]

Other conditions

1369. Subject to § 1371, no forfeiture for breach of a condition in a lease (other than a condition of re-entry on non-payment of rent) is enforceable until the lessor has served on the lessee or assignee of the lease a notice, specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee or assignee to remedy it, and, in any case, requiring the lessee or assignee to make compensation in money for the breach, and the lessee or assignee has failed within a reasonable time to remedy the breach (if capable of remedy), and, in any case, to make reasonable compensation therefor.

Conveyancing Act, 1881, s. 14 (1) (3).

During proceedings

1370. Even when a lessor is proceeding, by action or otherwise, to enforce a forfeiture for such breach, the Court may, subject to § 1371, on the application of the lessee or assignee, grant relief against such forfeiture, on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, as to the Court may seem fit.

Conveyancing Act, 1881, s. 14 (2).
Conveyancing Act, 1892, s. 4.

No relief

1371. The provisions of §§ 1369 and 1370 do not extend to any case in which forfeiture is claimed against a lessee, or assignee of a lease, on the ground of breach of a condition:

(i) against assigning, under-letting, parting with the possession, or disposing, of the land leased; *or*,

(ii) subject to § 1373, against the bankruptcy of the lessee, or the taking in execution of the lessee's interest; *or*,

(iii) for allowing (in case of a mining lease) the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

Conveyancing Act, 1881, s. 14 (6).

Relief to under-lessees

1372. Where the lessor is proceeding to enforce a forfeiture for breach of a condition in the lease, even in the circumstances specified in § 1371,[a] the Court may, on the application of an under-lessee, vest, for the whole term of the head lease or any shorter period (not being in either case longer than the unexpired term of the under-lease), the property comprised in the head lease, in such under-lessee, on such terms as the Court shall think fit.[b]

(a) *Cholmeley's School* v. *Sewell* [1894] 2 Q. B. 906.
Imray v. *Oakshette* [1897] 2 Q. B. 218.
Gray v. *Bonsall* [1904] 1 K. B. 601.
(b) Conveyancing Act, 1892, s. 4.

[The discretion allowed to the Court by this enactment is, obviously, very wide; but in fact it is generally exercised only on the terms that the under-lessee shall, during the remainder of his term, accept responsibility for the liabilities of the head lease. It will not be exercised (? in cases falling within § 1371) in favour of an under-lessee who has been a party to a breach of condition in consequence of his failure to investigate his lessor's title (*Imray* v. *Oakshette*, *ubi sup.*; *Matthews* v. *Smallwood* [1910] 1 Ch. 777).]

Relief on terms

1373. The relief described in § 1370 may, notwithstanding the provisions of § 1371 (ii), be granted in the case of proceedings to enforce forfeiture of a lease on the ground of the bankruptcy of the lessee or the taking of his interest in execution.

But: —

(i) it will not operate to suspend the forfeiture for more than one year from the date of the bankruptcy or execution, unless within

that time the lessee's interest has been sold or absolutely contracted to be sold;

Conveyancing Act, 1892, s. 2 (2).
Re Henry Castle & Sons (1906) 94 L. T. 396.

(ii) it cannot be granted where property comprised in the lease sought to be forfeited is —

(α) agricultural or pastoral land;
(β) mines or minerals;
(γ) a house used, or intended to be used, as a public house or beershop;
(δ) a house let as a dwelling house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
(ϵ) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or the character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

Conveyancing Act, 1892, s. 2 (3).

[There is no provision in the Act of 1892 for expanding the meaning of the word 'lessee' to include an assignee of the lease. But the statute is to be 'read together with' the Act of 1881 (Act of 1892, s. 1 (1)).]

Meaning of 'lease'

1374. The provisions of §§ 1369–1373 apply to original and derivative under-leases, and to grants at fee farm rents, or securing rents by condition, and to agreements for leases or under-leases where the lessees or under-lessees are entitled to enforce the same; and the words 'lessor,' 'lessee,' and 'under-lessee' have corresponding meanings.

Conveyancing Act, 1881, s. 14 (3).
Conveyancing Act, 1892, s. 5.

[Presumably, by a grant 'securing a rent by condition' is meant a grant under which rent is secured by means of a condition.]

Title derived from forfeited estate

1375. When an estate has been forfeited for breach of an express condition, any interest created out of it, by the former owner of the estate, even before the occurrence of the forfeiture, becomes (subject to § 1372) void as against the person entitled to enforce the forfeiture.

Platt v. *Sleap* (1611) Cro. Jac. 275.
G. W. R. v. *Smith* (1876) 2 Ch. D., at p. 253, *per* Mellish, L. J.
Parker v. *Jones* [1910] 2 K. B. 32.

[This rule does not hold in forfeiture for breach of a 'condition in law' (*Archer's Case* (1597) 1 Rep., at 67 a).]

TITLE II—COVENANTS (OTHER THAN COVENANTS IN LEASES) RUNNING WITH THE LAND

Benefit runs at law

1376. The benefit of any covenant affecting the user of land, and intended to be beneficial to other land, may be enforced by any owner of the last mentioned land who was contemplated as a beneficiary by the covenant; whether such owner, or his predecessor in title, was a party to the deed containing the covenant, or not, and whether he was aware of the existence of the covenant when he acquired his land, or not.

Real Property Act, 1845, s. 5.
Renals v. *Cowlishaw* (1878) 9 Ch. D. 125.
Rogers v. *Hosegood* [1900] 2 Ch. 388.
Dyson v. *Forster* [1909] A. C. 98.

In whose favour

1377. In order that the benefit of such a covenant may run with any land, it must have been made with or for the benefit of a person who had an interest in such land, and must affect the mode of occupation or the value of the land of the person seeking to enforce it.

Rogers v. *Hosegood, ubi sup.*, at p. 395.
Dyson v. *Forster, ubi sup.*, at p. 102.

[It was necessary, at law, that the person seeking to enforce the covenant should have acquired the actual estate of the original covenantee (*Webb* v. *Russell* (1789) 3 T. R. 393). But, probably, any one who was contemplated by the covenant, and has an interest in the land, may sue in equity.]

Burden does not run

1378. The burden of such a covenant, not being a restrictive covenant,[a] and not being made between lessor and lessee,[b] does not run with the land either at law or in equity, i. e. it cannot be enforced against any owner of the land intended to be affected (other than the original covenantor and his personal representatives), whether such owner acquired his interest with knowledge of the covenant, or not.

(a) *Haywood* v. *Brunswick Building Society* (1881) 8 Q. B. D. 403. *Austerberry* v. *Corpn. of Oldham* (1885) 29 Ch. D. 750, (overruling *Cooke* v. *Chilcott* (1876) 3 Ch. D. 694).

(b) Covenants between lessor and lessee are dealt with in Sect. I, Title VI, § 1146, *ante*.

Except in equity

1379. The burden of such a covenant, being restrictive, even though not made between a lessor and a lessee, runs with the land in equity,[a] but not at law; i. e. it can be enforced by injunction (and, *semble*, by a judgment for damages[b]), but only against a person who, being contemplated as being bound by the convenant, acquires any interest in the land of the original covenantor otherwise than as, or through, a

purchaser of the legal estate [c] for valuable consideration without notice of the covenant.[d]

(a) *Tulk* v. *Moxhay* (1848) 11 Beav. 571.
(b) *Sayers* v. *Collier* (1884) 28 Ch. D. 103.
Wilkes v. *Spooner* [1911] 2 K. B., at p. 480, *per* Scrutton, J.
(c) *Wilkes* v. *Spooner* [1911] 2 K. B. 473. (It is doubtful whether a purchaser who acquires without notice, but does not get the legal estate, is protected (*L. & S. W. R.* v. *Gomm* (1882) 20 Ch. D., at p. 583). On principle, he should not be.)
(d) The general doctrine as to 'implied notice' of equities applies; e. g. a person who acquires the estate of the covenantor without investigating the title is bound, if, on the ordinary investigation, he would have discovered the equity (*Nisbet's and Potts' Contract* [1906] 1 Ch. 386).

[It is said by some text-book writers (e. g. Platt, *Covenants*, at p. 471) that the burden of covenants for title runs with the land at law; but there seems to be no decided case, and, probably, the doctrine is a survival of the learning of warranties. Certainly the ordinary covenant does not run with the land at law (*Austerberry* v. *Corpn. of Oldham*, *ubi sup.*); and it was said by Leach, V. C., in *Barclay* v. *Raine* (1823) 1 Sim. & S. 449, that even a covenant to produce title-deeds does not so run. Of course a covenant by an ancestor could be enforced against his heir who had assets by descent; at any rate if the covenant was expressed to include heirs (*Cook* v. *E. of Arundel* (1656) Hardres, 87; *Dyke* v. *Sweeting* (1745) Willes, 587 — the objection successfully taken in error in the K. B., reported in 1 Wils. 181, was purely technical). But, since the passing of the Land Transfer Act, 1897, s. 1, this right has become of less importance.]

Building scheme

1380. The Court will presume an intention that covenants of the kind described in § 1376, being restrictive, shall run with the land, from the existence of a building scheme. To establish the existence of a building scheme, it must be proved: —

(i) that the plaintiff and defendant acquired from a common vendor;

(ii) that such vendor, prior to the sale to either party, (or his predecessor in title), laid out land, including the land of both parties, under a scheme intended to affect both;

(iii) that such scheme was intended for the benefit of purchasers of all lots sold;

(iv) that both parties, or their predecessors in title, purchased on that footing.

Elliston v. *Reacher* [1908] 2 Ch., at p. 384, *per* Parker, J., approved by C. A., *ibid.* 665.

Contracts

1381. When the existence of a building scheme is established, a contract not to deal with any portion of the land included in the scheme (including plots not sold) in a manner inconsistent with the scheme, will be implied; and such contract will be enforceable and binding, in the same manner and to the same extent, as a restrictive covenant to that effect.

Mackenzie v. *Childers* (1889) 43 Ch. D. 265.
Elliston v. *Reacher*, *ubi sup.*

Must be intention to benefit

1382. The mere facts (i) that the observance of the covenant would benefit the land of the plaintiff,[a] or (ii) that the plaintiff had notice of its existence

when he acquired his land,[b] will not, of themselves, entitle the plaintiff to enforce the covenant.

(a) *Reid* v. *Bickerstaff* [1908] 2 Ch. 305.
(b) *Willé* v. *St. John* [1910] 1 Ch. 325.

Inconsistent conduct

1383. A change in the conditions of the neighbourhood will not affect the rights or liabilities under the covenant. But conduct on the part of the plaintiff inconsistent with the observance of the covenant,[a] or acquiescing in the breach of the covenant,[b] will deprive him of his equitable remedy.

(a) *D. of Bedford* v. *British Museum* (1882) 2 My. & K. 552.
(b) *Sayers* v. *Collier* (1884) 28 Ch. D. 103.

Not a perpetuity

1384. Covenants restricting the user of land are not void for perpetuity; even though no limits of time are fixed for their operation.

Keppell v. *Bailey* (1834) 2 My. & K., at p. 527, *per* Lord Brougham, C.
Mackenzie v. *Childers* (1889) 43 Ch. D. 265.

[The reason is, that such covenants do not create future interests, but only impose restrictions on existing interests.]

Acts of predecessors

1385. A defendant who has acquired land on which a previous owner has erected a building in breach of a covenant such as that described in

§ 1379, is not liable to a mandatory order requiring him to remove it.

Powell v. *Hemsley* [1909] 2 Ch. 252.

[This case was very strong; because the defendant was himself the original covenantor. It seems to indicate an easy method of escape from the doctrine of *Tulk* v. *Moxhay*, when the restrictive covenant merely forbids the doing of a single act.]

NOTE.

There seems to have been no judicial decision or dictum as to the extent to which restrictions can be imposed upon land by covenants of the kind described in § 1379.

SECTION IV

VOLUNTARY ALIENATION OF LAND

TITLE I—ABSOLUTE CONVEYANCE INTER VIVOS

Form

1386. Subject to § 1497 (conveyance by infant under a custom), and §§ 1387 and 1388, a conveyance *inter vivos* (including a lease) of the legal title to an interest in land can only be made by deed or (in the case of registered land) by deed or registered transfer;[a] and a conveyance binding in equity (other than a lease at will) can only be made by writing signed by the conveying party or his agent thereunto lawfully authorized by writing.[b]

(a) Real Property Act, 1845, s. 3.
(b) Statute of Frauds (1677) ss. 1, 3.

Short leases

1387. A lease not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term amounts to two thirds at the least of the full improved value of the land demised, may be made by word of mouth.

Statute of Frauds (1677) s. 2.

1388. A surrender of a copyhold or customary tenement to the lord of the manor, with a view to its alienation, and any lawful grant or admittance by such lord in pursuance of custom, may be made by word of mouth in accordance with the custom of the manor. *Copyholds*

Statute of Frauds (1677) s. 3.

[There is no statutory provision as to grants or admittances of or to copyholds. But the practice is for these transactions, as well as surrenders, to be effected by word of mouth, and then to be recorded in writing on the manorial rolls.]

1389. A conveyance on sale of a freehold interest in unregistered land, situate within an area in which registration of title is compulsory on sale; does not pass the legal estate; unless and until the person in whose favour it is made is registered as proprietor. *Compulsory registration*

Land Transfer Act, 1897, s. 20.

[Up to the present date, the only area in which registration is compulsory on sale is the administrative county of London.]

1390. A conveyance by non-registered deed of an interest in registered land, whether or not situate within an area in which registration is compulsory on sale, will, if otherwise regular, convey the legal title. *Non-registered conveyance*

Capital and Counties Bank v. *Rhodes* [1903] 1 Ch. 631.

[A vendor who agrees to sell a mortgage sub-term in registered land, even in a compulsory area, cannot be called upon by the pur-

chaser to procure himself to be registered under s. 16 (2) of the Land Transfer Act, 1897 (*Voss' and Saunders' Contract* [1911] 1 Ch. 42).]

Estoppel by deed

1391. A conveyance by deed works an 'estoppel,' i. e. it prevents any party to it,[a] and any person subsequently claiming through such party,[b] denying, in any proceedings on such deed,[c] as against any person entitled to rely on such statement,[d] the truth of any clear and explicit statement,[e] contained in such conveyance, of material fact, with regard to his title. And if such statement was in fact not true at the time when it was made, but the person making it (?or any person claiming through him), subsequently acquires property the ownership of which would have justified such statement, such property passes by operation of law to the person or persons entitled to rely on such statement ('feeding the estoppel').[f]

(a) *Fairtitle* v. *Gilbert* (1787) 2 T. R., at p. 171, *per* Ashurst, J.
Doe v. *Roberts* (1819) 2 B. & Ald. 367.
Phillpotts v. *Phillpotts* (1850) 10 C. B. 85.

[It is a question of construction which of the parties to the deed are parties to any statement in it (*Stroughill* v. *Buck* (1850) 14 Q. B. 781).]

(b) *Doe* v. *Skirrow* (1837) 7 A. & E. 157.
Doe v. *Stone* (1846) 3 C. B. 176.
Dalton v. *Fitzgerald* [1897] 2 Ch. 86.

[Apparently, the rule does not apply if the statement was erroneous in law only, not in fact (*Re Anderson* [1905] 2 Ch. 70).]

(c) *Carpenter* v. *Buller* (1841) 8 M. & W. 209.
Carter v. *Carter* (1857) 3 K. & J. 617, at p. 645, *per* Wood, V. C.
Fraser v. *Pendlebury* (1861) 31 L. J. C. P. 1.

(d) Generally speaking, only parties to the deed, and persons claiming through them ('privies in blood or estate'), can set up the doctrine of estoppel (*Trinidad Asphalte Co.* v. *Coryat* [1896] A. C. 587). But there appears to be little authority on the point. As to who are 'privies in blood,' see *Weeks* v. *Birch* (1894) 69 L. T. 759.

(e) *Right* v. *Bucknell* (1831) 2 B. & Ad. 278.
Heath v. *Crealock* (1874) L. R. 10 Ch. App. 22.
General Finance Co. v. *Liberator Socy.* (1878) 10 Ch. D. 15.
Onward Buildg. Socy. v. *Smithson* [1893] 1 Ch. 1.

[e. g. the mere grant of an estate, even if accompanied by covenants for title, does not amount to such a statement. And the grantor or those claiming under him will not be estopped from denying that he had a title to the legal estate at the date of the grant (*General Finance Co.* v. *Liberator Socy.*, *ubi sup.*).]

(f) *Rawlyns' Case* (1587) 4 Rep. 52 a.
Style v. *Hearing* (1605) Cro. Jac. 73.
Edwards v. *Omellhallum* (1639) March, 64.
Doe v. *Oliver* (1830) 5 Man. & Ry. 202.

Delivery of deed

1392. A conveyance by deed takes effect from the delivery thereof.

Willis v. *Jermin* (1589) Cro. Eliz. 167.
Styles v. *Wardle* (1825) 4 B. & C., at p. 911, *per* Bayley, J.
Tupper v. *Foulkes* (1861) 9 C. B. N. S. 797.

[As to what constitutes 'delivery,' see *ante*, Bk. II, Pt. I, § 216. 'Anything to show that he treated the deed as his deed is enough' (*Tupper v. Foulkes*, *ubi sup.*, at p. 809, *per* Williams, J.).]

Disclaimer

1393. No one can be compelled to accept a conveyance by deed.[a] But a conveyance of land by deed at once vests the land in the grantee; even if he is unaware of its existence. The grantee may, however, on becoming aware of the conveyance, dis-

claim; in which case the land will be deemed never to have vested in him.[b]

(a) *Townson* v. *Tickell* (1819) 3 B. & Ald. 31.
(b) *Butler's and Baker's Case* (1591) 3 Rep., at 26 b. *per Curiam.*
Smyth v. *Wheeler* (1671) 2 Keb. 772.
Sir Simon Leech's Case (1692) Carth. 250.
Doe v. *Knight* (1826) 5 B. & C. 471.
Mallott v. *Wilson* [1903] 2 Ch. 494.

[Even the fact that the conveying party retains the conveyance in his own hands will not prevent the operation of the rule; if it is clear that he intended the conveyance to be effectual (*Doe* v. *Knight*, *ubi sup.*, at p. 692, *per Curiam*). And even a formal disclaimer only revests the interest of the disclaiming party, not any trusts limited out of it (*Mallott* v. *Wilson*, *ubi sup.*). It was said in *Butler's and Baker's Case*, *ubi sup.*, that a freehold could not be devested by a mere oral disclaimer *in pais*, i. e. without deed or record. But see the contrary decided in the modern case of *Re Birchall* (1889) 40 Ch. D. 436, which was, however, a case of devise.]

Gift to stranger

1394. An immediate interest may be taken under a deed executed after 1st October, 1845, by a person not named as a party thereto.

Real Property Act, 1845, s. 5.

[Before the passing of the Real Property Act, 1845, a person not a party thereto could take an interest under a 'deed poll,' i. e. a deed not professed to be made *inter partes* (2 Inst. 673). But a stranger could not take an immediate interest under an indenture purporting to be made *inter partes*.]

Presumption in favour of grantee

1395. A conveyance by deed is construed, so far as the words used will reasonably admit, in favour of the grantee and against the grantor.[a] The same

rule applies to an exception by the grantor out of the property conveyed to the grantee.[b]

(a) Co. Litt. 42, 183.
Willion v. *Berkley* (1562) 1 Plowd., at fo. 242 a, *per* Weston, J.
Re Stroud (1849) 8 C. B., at p. 529, *per* Wilde, C. J.
(b) *Bullen* v. *Denning* (1826) 5 B. & C. 842.
Savill Bros. v. *Bethell* [1902] 2 Ch. 523.

[There is a well-known exception in the case of a grant by the Crown (*Willion* v. *Berkley*, *ubi sup.*). And sometimes the statement of the rule is qualified by limiting it to conveyances for valuable consideration (*Neill* v. *D. of Devonshire* (1882) L. R. 8 App. Ca., at p. 149, *per* Lord Selborne, C.).]

Voluntary conveyances

1396. A conveyance of the legal estate in land is effectual, without valuable consideration, to pass also the equitable interest, even to a stranger, in the absence of expression to the contrary.

Villers v. *Beaumont* (1682) 1 Vern. 100, *per* Lord Nottingham, C.
Lloyd v. *Spillet* (1740) 2 Atk. 148.
Young v. *Peachy* (1741) *ibid.*, at p. 256, *per* Lord Hardwicke, C.
Fowkes v. *Pascoe* (1875) L. R. 10 Ch. App., at p. 348, *per* James, L. J.

[The opinion expressed by Lewin (*Trusts*, 12th ed., p. 164) and other text-book writers, to the effect that, in the absence of express words, there is a presumption of a resulting trust for the grantor, is not borne out by the decisions quoted in support of it; though there are earlier decisions (e. g. *Elliot* v. *Elliot* (1677) 2 Cha. Ca. 231; *D. of Norfolk* v. *Browne* (1697) Pre. Cha. 80) which appear to support that view. Of course, absence of consideration may be evidence of fraud; but fraud is never presumed. Equally of course, a voluntary conveyance may be invalid because it tends to defeat or delay creditors (*post*, Sect. xv). In order to prevent a resulting use of the legal estate in a purely voluntary conveyance to a stranger, the use must be expressed to be for the benefit of the grantee. (Sanders, *Uses*, p. 97).]

Not revocable

1397. Any conveyance of land made with intent to defraud purchasers, other than a conveyance for valuable consideration to a *bonâ fide* acquirer,[a] and any conveyance reserving power to the conveying party to revoke, determine, or alter such conveyance at his will or pleasure,[b] will be void against subsequent purchasers of such land.[c] But no voluntary conveyance, in fact made *bonâ fide* and without fraudulent intent, will be deemed fraudulent and void under this §, merely by reason of a subsequent purchase for value, or conveyance thereunder.[d]

(a) 27 Eliz. (1585) c. 4, s. 4. (The exception includes a mortgagee (s. 6)).
(b) *Ibid.*, s. 5.
(c) *Ibid.*, s. 2.
(d) Voluntary Conveyances Act, 1893, s. 2.

[The last mentioned statute was rendered necessary by the strained construction put upon the older Act, to the effect that a subsequent conveyance for value, even to a purchaser who knew of a former voluntary conveyance, defeated the voluntary conveyance (*Doe* v. *Manning* (1807) 9 East, 59). The Act of 1893 is retrospective; but with a saving for conveyances for value before its passing (s. 3).]

TITLE II—CONVEYANCE BY WAY OF MORTGAGE

Mortgage cannot be irredeemable

1398. Any conveyance of land having for its object to secure the payment of money is a mortgage, whatever it may be called.[a] A mortgage cannot be made irredeemable.[b]

(a) *Newcomb* v. *Bonham* .(1681) 1 Vern. 7 (sale with option of repurchase).
Fawcet v. *Bowers* (1693) 1 Ed. 287 (grant of rent).
James v. *Oades* (1700) 2 Vern. 402 (do.).
Re Alison (1879) 11 Ch. D. 284 (trust for sale).
Salt v. *M. of Northampton* [1892] A. C. 1 (effecting life insurance).
Santley v. *Wilde* [1899] 2 Ch., at p. 474, *per* Lindley, M. R.
(b) *Newcomb* v. *Bonham, ubi sup.*
Howard v. *Harris* (1683) 1 Vern. 190.
Fairclough v. *Swan Brewery Co.* [1912] A. C. 565.

Form of mortgage

1399. A mortgage of the legal estate may be made by deed, surrender (of copyholds) or registered disposition;[a] a mortgage conveying an equitable interest ('equitable mortgage') may be effected by deed,[b] by written memorandum or charge,[c] or by deposit of title deeds (including land certificate).[d] A statutory charge on registered land may also be effected by entry on the register of charges.[e]

(a) A legal mortgage is effected in the same way (*mutatis mutandis*) as an absolute conveyance (*ante*, Tit. I, §§ 1386, 1388, 1389).
(b) This method is adopted when the mortgagor has not in fact the

legal estate, but it is desired to secure for the mortgagee the statutory powers conferred by the Conveyancing Act, 1881 (*post*, §§ 1405–11).

(c) The advantage of this method is that the stamp duty is lower than on a mortgage by deed. But the mortgagee cannot exercise statutory powers.

(d) *James* v. *James* (1873) L. R. 16 Eq. 153. (In this case Equity allows the deposit to override the plain words of the Statute of Frauds).
Land Transfer Act, 1897, s. 8 (6).

(e) Land Transfer Act, 1875, s. 22. A peculiar advantage of this form is, that it confers statutory powers upon the mortgagee (Land Transfer Act, 1897, s. 9 (2)). But, presumably, it does not pass the legal estate.

Priorities

1400. Generally speaking, mortgages rank in priority in order of date; subject to the rule that the *bonâ fide* acquirer of the legal estate for value without notice of an earlier equitable mortgage takes priority of such mortgage.[a] But, subject to § 1419, *post*, the holder of a legal mortgage who makes further advances to the mortgagor without notice of any intervening mortgage, is entitled to be repaid such further advances in priority to such intervening mortgage;[b] and the holder of an equitable mortgage may, by taking a transfer of a legal mortgage, become entitled to add the amount of his claim on the equitable mortgage to the sum due on the legal mortgage, in priority to all prior equitable mortgages of which he was *bonâ fide* ignorant when he gave the value for his equitable mortgage ('Tacking').[c]

(a) *Rooper* v. *Harrison* (1855) 2 K. & J. 86, and see *ante*, Sect. I, Tit. XI, § 1313.

(b) *Bedford* v. *Backhouse* (1730) 2 Eq. Ca. Ab. 615.
Hopkinson v. *Rolt* (1861) 9 H. L. C. 514.
West v. *Williams* [1899] 1 Ch. 132.
Taylor v. *L. & Coy. Banking Co.* [1901] 2 Ch., at p. 256, *per* Stirling, L. J.

[*West* v. *Williams* shows, however, that this claim cannot be supported in the face of notice of the mesne mortgage; even though the legal mortgagee had actually bound himself to make the further advances.]

(c) *March* v. *Lee* (1670) 1 Cha. Ca. 162.
Blake v. *Hungerford* (1701) Pre. Cha. 158.

[It would appear from *Rooper* v. *Harrison*, *ubi sup.*, that the principle of 'tacking' can only be used as a defence. If the person setting it up sells the property by virtue of a power in the legal mortgage, he cannot retain the surplus over the amount due on the legal mortgage, to satisfy his claims under the equitable mortgage; at any rate if the legal mortgage contains a trust or destination of the surplus moneys for the next incumbrancer. The later case of *Selby* v. *Pomfret* (1861) 3 De G. F. & J. 595, though spoken of in the report as one of 'tacking,' was clearly 'consolidation' (*post*, § 1417).]

Dealings with mortgage

1401. A mortgagee may, subject to the rights of the mortgagor and other persons interested in the equity of redemption, transfer his mortgage debt and interest in the mortgaged property, either absolutely or by way of sub-mortgage; and his transferee or sub-mortgagee will, subject to the terms of the mortgage, and those of the transfer or sub-mortgage, enjoy all the rights of the original mortgagee.[a] Probably, the mortgagee cannot transfer part of the mortgage debt in such a way as to divide his remedies and powers between himself and his transferee.[b] The

interest of the mortgagee, even when the mortgaged property is realty, is personal estate.[c]

(a) *Re Lord Southampton's Estate* (1880) 16 Ch. D. 178.
Turner v. *Smith* [1901] 1 Ch. 213.
Land Transfer Act, 1875, s. 40.

[Notice to the mortgagor of the transfer is not essential to render the transaction effectual between the mortgagee and the transferee; but, as the above cases show, it is necessary to prevent the transferee being prejudiced by subsequent dealings between the original mortgagee and the mortgagor.]

(b) *Flower* v. *Pritchard* (1909) 53 Sol. Jo. 178.
Forster v. *Baker* [1910] 2 K. B. 636.

(c) *Casborne* v. *Scarfe* (1737) 1 Atk., at p. 605, *per* Lord Hardwicke, C. (Consequently, a devise of 'lands' generally, will not pass the beneficial interest in land vested in the testator by way of mortgage, or the mortgage debt (*Winn* v. *Littleton* (1689) 1 Vern. 3). But if a mortgagee, not being a trustee (Conveyancing Act, 1911, s. 9 (1)), forecloses, or acquires a title by possession under the Real Property Limitation Acts (*post*, Tit. IV) his interest acquires the character of the estate of the mortgagor (*Re Loveridge* [1904] 1 Ch. 518).)

Non-statutory powers of mortgagee

1402. Every legal mortgagee (including the registered proprietor of a registered charge) has, after the mortgage money has become due, and independently of any express authority contained in the mortgage, the following remedies for the enforcement of his security, viz.:

(i) the right to take possession of the mortgaged property;

Land Transfer Act, 1875, s. 25.
Doe v. *Lightfoot* (1841) 8 M. & W. 553.
Bovill v. *Endle* [1896] 1 Ch. 648.

[Unless there is any stipulation to the contrary in the mortgage, the mortgagee may exercise this right at any time after the making

of the mortgage (*Doe* v. *Lightfoot*, *ubi sup.*); but one drawback of such a step is, that it entitles the mortgagor to pay off the mortgage at once without notice (*Bovill* v. *Endle*, *ubi sup.*). Another drawback is, that the mortgagee in possession is bound to account, not only to the mortgagor or his representatives (*Wragg* v. *Denham* (1836) 2 Y. & Co. (Exch.) 117; *Taylor* v. *Mostyn* (1886) 33 Ch. D. 226), but to subsequent incumbrancers, and even after he has assigned the mortgage (*Venables* v. *Foyle* (1660) 1 Cha. Ca. 2), for all the profits which he has received, or, without wilful default, might have received. Moreover, it is doubtful whether, having once taken possession, he can relinquish it (*Re Prytherch* (1889) 42 Ch. D. 600, *per* North, J.).]

(ii) the right (unless excluded by the terms of the mortgage) by action or other proceedings to recover from the mortgagor personally the amount due on the mortgage;

Land Transfer Act, 1875, s. 23.
Meynell v. *Howard* (1696) Pre. Cha. 61.
King v. *King* (1735) 3 P. Wms. 358.

[But, if there is no covenant, express or implied, for payment of the money, the debt will be only simple contract. And the mortgagee cannot sue the assignee of the equity of redemption personally to recover the mortgage money, or prove in his bankruptcy, even if he has paid interest (*Ancaster* v. *Mayer* (1785) 1 Bro. C. C., at p. 464, *per* Lord Thurlow, C.; *Re Errington* [1894] 1 Q. B. 11).]

(iii) the right to obtain from the Court an absolute order of foreclosure, excluding the mortgagor from all further right to redeem the mortgage.

Land Transfer Act, 1875, s. 26.

[Such an order will be made as of course if any money remains due; but an order *nisi* will first be made, directing accounts to be taken by the Master, and giving the mortgagor, at least in the case of a formal mortgage, six months from the date of the Master's certificate, in which to redeem. A personal order for payment

within a much shorter time (*e. g.* a month) of the money due may be made, however, if asked for by the writ (*Farrer* v. *Lacy* (1883) 25 Ch. D. 636). An equitable mortgagee cannot take possession (*Garfitt* v. *Allen* (1888) 37 Ch. D., at p. 50, *per* North, J.); but he has the other rights described in the §.]

Re-opening foreclosure

1403. A mortgagee who, after obtaining a foreclosure, sues the mortgagor on his personal liability, 're-opens' the foreclosure, i. e. entitles the mortgagor to redeem; [a] and, if the mortgagee has parted with the property after foreclosure, he cannot sue the mortgagor personally to recover the mortgage money.[b]

(a) *Dashwood* v. *Blythway* (1729) 1 Eq. Ca. Ab. 317. *Kinnaird* v. *Trollope* (1888) 39 Ch. D. 637.
(b) *Perry* v. *Barker* (1806) 13 Ves. 198.

Annual rests

1404. Generally speaking, a mortgagee in possession, though accountable for the surplus rents and profits after discharging interest, will not be compelled to deduct them, as they accrue, from the principal, so as to reduce the debt by instalments.[a] But if there was no interest in arrear when he entered, or if the whole of the principal and interest has been covered by the receipts, the mortgagee in possession will be compelled to account with annual rests, and to pay compound interest at four *per cent.* on the amount found due from him.[b]

(a) *Wrigley* v. *Gill* [1905] 1 Ch., at p. 253, *per* Warrington, J. *Ainsworth* v. *Wilding*, *ibid.*, at p. 440, *per* Joyce, J.
(b) *Ashworth* v. *Lord* (1887) 36 Ch. D. 545.

[Consequently, if there is a provision in the mortgage for capitalization of interest in arrear, it cannot be enforced, so long as the amount of rents and profits received by the mortgagee exceeds the amount of interest due (*Wrigley* v. *Gill* [1906] 1 Ch. 165).]

Leases and cutting of timber by mortgagee

1405. Subject to § 1410, where a mortgagee is in possession of land under a mortgage by deed or registered charge made after 31st December, 1881,[a] or where he has appointed a receiver, who still acts, under the statutory power described in § 1406 (ii), *post*,[b] he may, subject to the terms of the mortgage deed:[c] —

(a) Conveyancing Act, 1881, s. 2 (6), s. 18 (13) (16), s. 19 (1) (4). Land Transfer Act, 1897, s. 9 (2).
(b) Conveyancing Act, 1911, s. 3 (11).
(c) Conveyancing Act, 1881, s. 18 (13), s. 19 (3).

(i) grant agricultural or occupation leases of any part of the land for any terms not exceeding twenty-one, or building leases for any terms not exceeding ninety-nine years, to take effect in possession not later than twelve months after their dates, at the best rent that can reasonably be obtained without fine, which leases will be binding against all prior incumbrancers and the mortgagor;

Ibid., s. 18 (2)–(6).

[Various provisions for securing the formality and effectiveness of the leases are contained in the section (7)–(12). And a mortgagee in possession, or who has appointed a still acting receiver, may accept surrenders of existing leases with a view to granting

leases authorised by the Act, or the mortgage deed, or an agreement pursuant to the Act (Conveyancing Act, 1911, s. 3).]

(ii) cut and sell timber and other trees ripe for cutting, and not planted or left for shelter or ornament, or contract for any such cutting and sale, to be completed within twelve months from the making of the contract.

Conveyancing Act, 1881, s. 19 (1) (iv).

[Apart from the Act, a mortgagee can only cut timber if he shows the security to be defective (*Withrington* v. *Banks* (1725) Sel. Ca. Cha. (Macnaghten) 92).]

Other statutory powers of mortgagee

1406. Subject to §§ 1408, 1410, *post*, a mortgagee by deed executed after 31st December, 1881, or by registered charge, whether in possession of the mortgaged property or not, but only when the mortgage money has become due, may, subject to the terms of the mortgage:

(i) sell, or concur in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, in any reasonable manner;

Ibid., s. 19 (1) (i), (2).
Land Transfer Act, 1897, s. 9 (2).

[The mortgagee holds any surplus produced by a sale after satisfying his claim, for the person 'entitled to the mortgaged property' (Conveyancing Act, 1881, s. 21 (3)), which, presumably, means the person who was entitled to it (subject to the mortgage) before the sale. Of course, the mortgagee cannot compel prior incumbrancers to join in the sale; but a useful section (s. 5) of the Conveyancing Act, 1881, allows the Court to authorize a sum of money

to be paid into Court to meet prior incumbrances, and to declare the land free from incumbrance.]

(ii) appoint by writing from time to time a receiver of the income of the mortgaged property or any part thereof, who will, unless the mortgage otherwise provides, be deemed the agent of the mortgagor, and who will have power to demand and recover all the income of such property by action, distress, or otherwise, in the name of the mortgagor or of the mortgagee.

Conveyancing Act, 1881, s. 19 (1) (iii), 24 (1)–(5).
Land Transfer Act, 1897, s. 9 (2).

[The moneys coming to the receiver are to be employed (1) in discharging outgoings (2) in keeping down prior charges (3) in paying the receiver's commission, premiums on insurance, and repairs authorized by the mortgagee in writing (4) in paying the mortgagee's interest. The balance is to be paid to the person entitled to the income subject to the receiver (Conveyancing Act, 1881, s. 24 (6)–(8)).]

Special terms of sale

1407. Where the mortgage deed was executed after 31st December, 1911, a mortgagee, exercising his power of sale under § 1406 may —

(i) impose on any part of the land sold, or any part remaining unsold, any restriction or reservation, with respect to building on, or other user of, such land, or with respect to mines and minerals, or for the purpose of the more beneficial working

thereof, or with respect to any other thing;

(ii) sell the mortgaged property, or any part thereof, or any mines and minerals apart from the surface: —

(a) with or without a grant or reservation of easements, rights, and privileges in relation to the property remaining in mortgage or the part sold;

(b) with or without an exception or reservation of all or any of the mines or minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, or other powers, easements, rights, and privileges for mining purposes, in relation to the property remaining unsold, or any property sold;

(c) with or without covenants by the purchaser to expend money on the land sold.

Conveyancing Act, 1911, s. 4.

Restrictions on powers

1408. The mortgagee must not exercise the powers of sale or appointment of a receiver described in § 1406, until there has occurred: —

(i) three months' default in payment of the mortgage money after written notice to pay off, *or*

(ii) failure to pay any part of the interest for two months after it became due, *or*

(iii) some breach of a provision made on behalf of the mortgagor or a person concurring in the mortgage, other than the covenant for payment of mortgage money and interest.[a]

But no purchaser, or person paying money to a receiver under the above powers, is bound to enquire whether a case for a sale or the appointment of a receiver has arisen.[b]

(a) Conveyancing Act, 1881, ss. 20, 24 (1).

(b) *Ibid.*, ss. 21 (2), 24 (4); Conveyancing Act, 1911, s. 5.

[*Semble*, if the mortgage-money is not due, the power of sale or appointment of a receiver does not exist under the Act; and a purchaser or tenant will not be protected under the above clause. (But see Conveyancing Act, 1911, s. 5 (1).) A mortgagee who has obtained a foreclosure order *nisi* cannot properly exercise his power of sale; but a *bonâ fide* purchaser from him will be protected (*Stevens* v. *Theatres Ld.* [1903] 1 Ch. 857). Subject to these reservations, the power of sale, except in the case of a registered charge (Land Transfer Act, 1897, s. 9 (2)), can be exercised by any one entitled to receive and give a discharge for the mortgage money (Conveyancing Act, 1881, s. 21 (4)); and such person can obtain from any one, other than a prior incumbrancer, any deed or document of title relating to the property, to which a purchaser under the power of sale would be entitled (Conveyancing Act, 1881, s. 21 (7)).]

Power to insure

1409. Subject to § 1410, a mortgagee by deed executed since 31st December, 1881, or by a reg-

istered charge, whether in possession or not, and whether the mortgage money has become due or not, may (subject to the terms of the mortgage) unless an adequate insurance is maintained by the mortgagor, insure any building, or any effects or property of an insurable nature, being part of the mortgaged property, against loss or damage by fire; and the premiums paid for any such insurance will be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

Conveyancing Act, 1881, ss. 19 (i) (ii), 23.
Land Transfer Act, 1897, s. 9 (2).

[There are certain regulations as to the amount for which, and the circumstances in which, the mortgagee may insure. The mortgagee may require all money received on an insurance effected under the deed or the Act to be applied in making good the damage, or (subject to legal or contractual obligations to the contrary) towards discharge of the amount due under the mortgage (Conveyancing Act, 1881, ss. 19 (i) (ii), 23).]

Mortgagee's powers may be varied

1410. The mortgagee's statutory powers of sale, leasing, insurance, and appointment of a receiver, only apply in so far as a contrary intention is not expressed in the mortgage deed, or, in the case of leasing, otherwise in writing.

Conveyancing Act, 1881, ss. 18 (13), 19 (3).
Land Transfer Act, 1897, s. 9.
Conveyancing Act, 1911, s. 4.

[It seems a little doubtful whether the special powers conferred by this last enactment (§ 1407, *ante*) can be restricted by the mortgage deed, unless the power of sale itself is excluded.]

Sale instead of foreclosure or redemption

1411. In any action for foreclosure or redemption, or for raising and payment in any manner of mortgage money, the Court may, on the application of any person interested either in the mortgage money or the right of redemption, direct a sale of the mortgaged property on such terms as the Court thinks fit, without previously determining the priorities of incumbrancers.[a] But such a direction may be revoked, and an order of foreclosure made, if the Court thinks fit.[b]

(a) Conveyancing Act, 1881, s. 25.

[This section is of great use to informal mortgagees. Before the Act, it was doubtful whether a mortgagee by deposit of title deeds was entitled to a sale; unless there was a written agreement by the mortgagor to execute a formal mortgage (*Oldham* v. *Stringer* (1885) 51 L. T. 895). Now he can bring an action for foreclosure, and ask for a sale.]

(b) *Lloyds Bank* v. *Colston* (1912) 106 L. T. 420. (On the ground that the property was worth less than the amount due to the mortgagee, and that a sale would be an useless expense.)

Equity of redemption

1412. A mortgagor may, subject to the rights of the mortgagee or mortgagees, sell, mortgage, lease, surrender, or otherwise deal with his equity of redemption in the land, in the same manner as any other equitable interest; and such equity of redemption will be deemed to be real or personal estate in accordance with the character of the property mortgaged.

Casborne v. *Scarfe* (1737) 1 Atk., at p. 605, *per* Lord Hardwicke, C. *West* v. *Williams* [1899] 1 Ch., at p. 143, *per* Lindley, M. R.

[The purchaser of an equity of redemption is, in general, bound in equity to indemnify the mortgagor against liability for payment of the mortgage debt (*Waring* v. *Ward* (1802) 7 Ves., at p. 337, *per* Lord Eldon, C.). But this rule does not apply where the circumstances of the transfer rebut the presumption that such was the intention of the parties (*Mills* v. *United Counties Bank* [1912] 1 Ch. 231).]

Right to redeem

1413. Subject to §§ 1411 and 1417, any person interested in any property subject to a mortgage may, at any time after the mortgage money has become due,[a] and at any time before the mortgagee has actually parted with the property to a person entitled to hold it against equitable claims,[b] redeem the property, on payment to the mortgagee of the amount due for principal, interest, and costs.[c] And any person entitled to redeem mortgaged property may have an order for sale instead of redemption, in any action brought by him for sale or redemption (of the mortgage).[d]

(a) *Brown* v. *Cole* (1845) 14 Sim. 427.
(b) *Ante*, Sect. I, Tit. XI, § 1313.
(c) *Christian* v. *Field* (1842) 2 Ha. 177 (creditors in administration suit).
Smith v. *Green* (1844) 1 Coll. C. C. 555 (subsequent incumbrancer).
Batchelor v. *Middleton* (1847) 6 Ha. 75 (legatees having a charge on the equity).
Pearce v. *Morris* (1869) 39 Ch. D., at p. 229, *per* Lord Hatherley, C.
Anderson v. *Pignet* (1872) L. R. 8 Ch. App., at p. 190, *per* Mellish, L. J. (dowress).
Beckett v. *Buckley* (1874) L. R. 17 Eq. 435 (judgment creditor of mortgagor).
Bankruptcy Act, 1883, Sched. I (12), II, (12) (trustee in bankruptcy of mortgagor).
Tarn v. *Turner* (1888) 39 Ch. D. 456 (lessee of equity).
(d) Conveyancing Act, 1881, s. 25 (1).

[Owing to expressions of Wright, J., in *Re Vautin* [1899] 2 Q. B. 549, there seems to be some little doubt whether the trustee in bankruptcy of the mortgagor is entitled to redeem; unless the mortgagee claims to vote or receive a dividend in the bankruptcy. But see *Re Button* [1905] 1 K. B. 602. The person seeking to redeem must, in general, give the mortgagee six months' notice, or pay six months' interest. But if the mortgagee has taken any steps to enforce payment, the mortgagor may pay off at once (*Bovill* v. *Endle* [1896] 1 Ch. 648; *Edmondson* v. *Copland* [1911] 2 Ch. 301); and, in any case, the mortgagor can pay off on the day fixed by the mortgage for repayment, without notice. Where no day is fixed for payment, the mortgagor must give reasonable notice (*Fitzgerald's Trustees* v. *Mellersh* [1892] 1 Ch. 385). It is the duty of the mortgagee on redemption to hand over the title deeds and make a reconveyance to the redeeming party; but if the latter appears to have only a limited interest in the equity of redemption, the reconveyance should be so worded as to reserve the rights of other persons interested (*Pearce* v. *Morris, ubi sup.*). A mortgagee who unreasonably refuses to reconvey on tender, is liable to be ordered to pay the costs of a redemption action (*Smith* v. *Green*, *ubi sup.*). It has been held (*Ramsbottom* v. *Wallis* (1835) 5 L. J. Ch. (N. S.) 92) that a subsequent mortgagee whose right to enforce his mortgage is not yet exercisable, cannot redeem a prior mortgagee; although the prior mortgage is redeemable by the mortgagor. But the terms of the second mortgage were peculiar in this case.]

Effect of reconveyance

1414. A reconveyance to or for the benefit of the mortgagor on redemption operates for the benefit of the incumbrancer next in succession, if any; and the mortgage debt is extinguished.[a] (See *ante*, Sect. I, Tit. I, § 1041 n.) But where the mortgage is redeemed by a third party, and the effect of a merger of the debt would be to make a gift to the next incumbrancer or person interested, at the expense of the party redeeming, there is a presumption that the party redeeming the mortgage intended to

keep alive the mortgage, and it will be treated as still subsisting for his benefit.[b]

(a) *Toulmin* v. *Steere* (1817) 3 Mer. 210.
Otter v. *Lord Vaux* (1856) 2 K. & J. 650.
Manks v. *Whiteley* [1912] 1 Ch. 735.

[*Toulmin* v. *Steere* has been severely criticized; and it went much further than is necessary to support the proposition for which it is quoted. But for that proposition it is good authority. *Manks* v. *Whiteley* is at present under appeal; but rather on the question of the construction to be put on the transaction, than on the existence of the principle in the text.]

(b) *Burrell* v. *E. of Egremont* (1844) 7 Beav. 205.
Thorne v. *Cann* [1895] A. C. 11.
Liquidation Estates Co. v. *Willoughby* [1898] A. C. 321.

'Clogging the equity'

1415. Any stipulation in a mortgage, or forming part of a mortgage transaction, will be unenforceable against the mortgagor, or the person seeking to redeem the mortgage, in so far as it contemplates any of the following objects, viz.: —

[Whether or not the stipulation is part of the mortgage transaction, is a question of fact in each case. Generally speaking, if it is not, it will be enforceable (*Reeve* v. *Lisle* [1902] A. C. 461; *De Beers* v. *British South Africa Co.* [1912] A. C. 52).]

(i) the postponement for an unreasonable period of the exercise of the right of redemption;

Talbot v. *Braddill* (1683) 1 Vern. 394.
Morgan v. *Jeffreys* [1910] 1 Ch. 620.

[There is no objection to a postponement for a reasonable period (*Biggs* v. *Hoddinott* [1898] 2 Ch. 307); especially if the

right to postpone is mutual (*Williams* v. *Morgan* [1906] 1 Ch. 804).]

(ii) the imposition of a higher rate of interest as a penalty for unpunctual payment of a lower;

Holles v. *Wyse* (1693) 2 Vern. 289, overruling *M. of Hallifax* v. *Higgens* (1689) *ibid.* 134.

[But it is not a penalty to stipulate for interest at one rate, reducible to a lower on punctual payment (*Strode* v. *Parker* (1694) *ibid.* 316), or that, on failure to pay an instalment of capital, the whole shall become due (*Wallingford* v. *Mutual Society* (1880) L. R. 5 App. Ca., at p. 696, *per* Lord Selborne, C.), or to arrange for interest in arrear to be added to capital (*Wrigley* v. *Gill* [1906] 1 Ch. 165).]

(iii) the giving to the mortgagee a right or option to purchase the equity of redemption;

Bowen v. *Edwards* (1660) 1 Cha. Rep. 117.
Willett v. *Winnell* (1687) 1 Vern. 488.
Jarrah Co. v. *Samuel* [1904] A. C. 323.

[It has been questioned whether a mortgagee could enforce, during the continuance of the mortgage, a stipulation giving him a right of pre-emption, in the event of the mortgagor selling the property (*Orby* v. *Trigg* (1722) 9 Mod. 2).]

(iv) the retention by the mortgagee of any collateral advantage, or any right or claim, against the mortgaged property [(a)] or the mortgagor,[(b)] or, *semble*, any other person,[(c)] after the redemption of the mortgage;

(a) *Noakes* v. *Rice* [1902] A. C. 24, substantially overruling *Santley* v. *Wilde* [1899] 2 Ch. 474.

(b) *Bradley* v. *Carritt* [1903] A. C. 253.
(c) *Ibid.*, at p. 261.

[There is, however, no objection to a stipulation for a collateral advantage during the continuance of the security. It is merely a part of the interest (*Biggs* v. *Hoddinott* [1898] 2 Ch. 307).]

(v) the imposition of any penalty on or difficulty in the exercise of the right of redemption.

Davies v. *Chamberlain* (1909) XXVI T. L. R. 138 (where, however, the stipulation was held not to be part of the mortgage transaction).
Fairclough v. *Swan Brewery Co.* [1912] A. C. 565.

And the person entitled to redeem may do so regardless of any such stipulation.

[At one time, it was very common for a mortgagor in actual occupation of the mortgaged property to attorn tenant to the mortgagee in the mortgage deed, at a rent equivalent to the amount of the annual interest; the chief object being to give the mortgagee a right of distress on non-payment of the interest. But this result can clearly not be achieved without registration under the Bills of Sale Acts (*post*, Sect. X, Tit. II, §§ 1573–1579); and the attornment clause, though it has certain other advantages, is now rarely found.]

No 'consolidation' unless reserved

1416. Unless the operation of section 17 of the Conveyancing Act, 1881, is expressly excluded by the mortgage deeds or one of them, a mortgagor can redeem any mortgage made since 1881, without redeeming any other mortgage held by the mortgagee on any property other than that comprised in the mortgage sought to be redeemed.

Conveyancing Act, 1881, s. 17.
Griffith v. *Pound* (1890) 45 Ch. D. 553.
Re Salmon [1903] K. B. 147.

[By the terms of the section, the operation of the doctrine of Consolidation can only be excluded by a deed. There seems no reason to doubt that the operation of s. 17 of the Conveyancing Act, 1881, can be excluded by a registered charge under seal (Land Transfer Rules, 1903, R. 169).]

'Consolidation'

1417. When section 17 of the Conveyancing Act, 1881, does not apply, a mortgagee can refuse to allow redemption of any mortgage, after the day fixed for repayment of the money thereby secured has passed;[a] unless the person seeking to redeem will also redeem any other overdue[a] mortgage created by the same mortgagor,[b] in the hands of the mortgagee, the equity of redemption whereof has, at any time since both mortgages came into the hands of the mortgagee, been vested, together with the equity of redemption of the mortgage sought to be redeemed, in the person seeking to redeem, or any person through whom he claims.[c] This rule only applies where both the mortgages were originally created by the same person.[d]

(a) *Cummins* v. *Fletcher* (1879) 14 Ch. D. 699.

[This is an essential condition of the equitable right to consolidate. If the mortgagor is relying on a legal right to redeem, there is no opportunity of imposing terms upon him.]

(b) *Sharp* v. *Rickards* [1909] 1 Ch. 109.
(c) *Pledge* v. *White* [1896] A. C., at p. 198, *per* Lord Davey.
(d) *Sharp* v. *Rickards*, *ubi sup.*

[The doctrine of Consolidation, which is now not much favoured by the Courts, began with the very simple case in which the same mortgagor mortgaged two different properties to the same mortgagee,

allowed the days for redemption of both to pass, and then sought to redeem one mortgage, leaving the mortgagee with, perhaps, an inadequate security for the other. In such a case, the Court of Chancery applied the maxim: 'he who seeks equity must do equity' (*Pope* v. *Onslow* (1692) 2 Vern. 286). The doctrine was then extended to cover the much more questionable case in which one of the two equities had been sold to a stranger who sought to redeem (*Ex parte Carter* (1773) 2 Amb. 733). Finally, it was extended to cover the case in which the same mortgagor had mortgaged to different mortgagees, by mortgages which ultimately came to the same hand (*Vint* v. *Padget* (1858) 2 De G. & J. 611; *Selby* v. *Pomfret* (1861) 3 De G. F. & J. 595). But here the doctrine stopped; Fry, J., in *Harter* v. *Colman* (1882) 19 Ch. D. 636, refusing to extend it to the case in which the mortgagor, having assigned his first equity of redemption to A, subsequently made another mortgage to the same mortgagee, who sought to consolidate against A. (See also *Jennings* v. *Jordan* (1881) L. R. 6 App. Ca. 698; *Hughes* v. *Britannia B. S.* [1906] 2 Ch. 607). The right of consolidation can be enforced actively by a foreclosure action (*Tribourg* v. *Pomfret* (1773) 2 Ambl. 733 n.), and, *semble*, also by means of a sale of the property comprised in one of the mortgages (*Selby* v. *Pomfret* (1861) 3 De G. F. & J. 595).]

Mortgagor's power of leasing

1418. A mortgagor in possession of land, the mortgage having been made since 1881, and no receiver, who still acts, having been appointed by the mortgagee, has, subject to the terms of the mortgage deed, the same power of making leases and accepting surrenders as a mortgagee in possession (*ante*, § 1405) [a]. Such leases will take effect out of the legal estate, and bind all incumbrancers.[b]

(a) Conveyancing Act, 1881, s. 18 (1); 1911, s. 3.
(b) *Wilson* v. *Queen's Club* [1891] 3 Ch. 522.

[Consequently, even if the owner of the legal estate, not being in possession, joins in the lease, the lessee's rights, though binding him, will be derived from the mortgagor in possession, as being the better title (*John Brothers* v. *Holmes* [1900] 1 Ch. 188).]

May require transfer

1419. A person entitled to redeem a mortgage may, despite any stipulation to the contrary, require the mortgagee, if the latter has not been in possession, on the terms upon which he would be bound to reconvey, to assign the mortgage debt and transfer the mortgaged property to any third person, as the person entitled to redeem may direct.[a] But a requisition to this effect by a prior incumbrancer will prevail over a requisition by a later; and the requisition of any incumbrancer over a requisition of the mortgagor.[b]

(a) Conveyancing Act, 1881, s. 15.
(b) Conveyancing Act, 1882, s. 12.

[This last provision appears to affect somewhat seriously the previously existing possibilities of 'tacking' (*ante*, § 1400). It applies to all mortgages, whenever made.]

Power to inspect title-deeds

1420. A person entitled to redeem a mortgage made since the year 1881, may, notwithstanding any stipulation to the contrary, at his own request and cost, and on payment of the mortgagee's costs and expenses occasioned thereby, inspect and make copies of or extracts from the documents relating to the mortgaged property, in the custody or power of the mortgagee.

Conveyancing Act, 1881, s. 16.

Marshalling

1421. When two separate estates or interests have been mortgaged to A, and only one of them to B, B

is entitled, as against the mortgagor and his representatives,[a] a surety for the mortgagor,[b] and the trustee in bankruptcy of the mortgagor,[c] to compel A to resort first for payment to the estate which is not mortgaged to him (B).

(a) *Lanoy* v. *D. of Athol* (1742) 2 Atk. 444, *per* Lord Hardwicke, C.
Aldrich v. *Cooper* (1803) 8 Ves., at p. 395, *per* Lord Eldon, C.
Tidd v. *Lister* (1852) 10 Ha. 157.
Gibson v. *Seagrim* (1855) 20 Beav. 741.
(b) *South* v. *Bloxam* (1865) 2 H. & M. 457.
(c) *Ex parte Hartley* (1835) 1 Deac. 288 (Court of Review).
Ex parte Stephenson (1847) 1 De Gex, 586 (do.).
Gibson v. *Seagrim, ubi sup.*

[Where there are rival claims to marshal, the mortgagee of the two or more properties must pay himself rateably out of each (*Gibson* v. *Seagrim*, *ubi sup.*; *Moxon* v. *Berkeley Bdg. Society* (1890) 59 L. J. Ch. 524). But the right of marshalling does not prevent a mortgagee realizing his securities in such manner and order as he thinks fit. (*Manks* v. *Whiteley* [1911] 2 Ch., at p. 466, *per* Parker, J.). Another instance of marshalling of mortgages occurs when two or more separate properties are mortgaged by the same mortgagor to secure a single debt. In such a case, even before the doctrine of the Real Estate Charges Acts is applied, the burden of the debt will, as between the different representatives of the mortgagor, be apportioned rateably on the different properties, in proportion to their respective values (*Re Athill* (1880) 16 Ch. D., at pp. 229, 224).]

Power to charge

1422. Subject to restrictive rules of law affecting special cases, any owner of an interest in land may charge it with liability for payment of any sum or sums of money specific or unascertained. Such charge may be effected by writing, sealed or unsealed, or by testament

Cupit v. *Jackson* (1824) 13 Price, 721.
White v. *James* (No. 2) (1858) 26 Beav. 191.
Horton v. *Hall* (1874) L. R. 17 Eq. 437.

Rights of owner of charge

1423. The person entitled to the benefit of such a charge may, subject to the terms of the instrument creating it, and to the interests of all prior incumbrancers, apply to the Court for the appointment of a receiver of the rents and profits of the land, and a sale or mortgage of the interest subject to the charge, with a view to the realization thereof.[a] But he is not entitled to an order for foreclosure, or the other remedies of a mortgagee.[b]

(a) *Re Tucker* [1893] 2 Ch. 323.
Hambro v. *Hambro* [1894] 2 Ch. 564.
Nightingale v. *Reynolds* [1903] 2 Ch. 236.
(b) *Sampson* v. *Pattison* (1842) 1 Ha. 533.
Tennant v. *Trenchard* (1869) L. R. 4 Ch. App., at p. 542, *per* Lord Hatherley, C.
Re Owen [1894] 3 Ch. 220.

[The remedy is in the discretion of the Court, unless there is an express power of sale in the instrument of charge. But it may be granted in all cases in which any sum appears to be charged upon land or the income thereof; even though there are no express words to that effect in the charge, and even though the owner of the charge has legal remedies, e. g. by entry and distress (*Hambro* v. *Hambro*, *ubi sup.*). Where the charge is created by the testament of a person dying since 5th August, 1897, there is, of course, usually no need to resort to the jurisdiction of the Court; as the personal representatives may sell in the exercise of their general powers (Land Transfer Act, 1897, s. 2). And, even where the death is prior to 6th August, 1897, trustees of land devised charged with the payment of debts or *specific* sums of money, and executors (but not administrators), have power to sell or mortgage for payment of such charges (Law of Property Amendment Act, 1859, ss. 14–18).]

Remedies to enforce annual charge

1424. The owner of any annual charge on land or the income of land, created since 1881, and not being rent incident to a reversion, has, subject to the terms of the instrument creating the charge, the remedies for the recovery of such charge specified as belonging to a rent-charger in Sect. I, Tit. IX, § 1289, *ante*.[a] And such powers, whether exercised under the statute or by virtue of any other instrument, are not void for perpetuity.[b]

(a) Conveyancing Act, 1881, s. 44.
(b) Conveyancing Act, 1911, s. 6.

[The remedies conferred by the earlier Act are exerciseable in the case of charges created since 1881; whether under powers created before that date or since (Act of 1911, s. 6 (2)).]

Redemption of annual charges

1425. Any annual sum issuing in perpetuity out of land, and not being a rent reserved on a sale or

lease, or a rent made payable under a grant or licence for building purposes, may be redeemed by any person interested in the land, in the manner described in Sect. I, Tit. IX, § 1294, *ante*.

Conveyancing Act, 1881, s. 45.

Liens on land

1426. A vendor of land, any part of whose purchase money remains unpaid,[a] a purchaser of land, who has paid any part of his purchase money but has not obtained a conveyance of the land,[b] a trustee who has expended his own money on land in necessary repairs or improvements,[c] and any person who has expended money on the improvement of land, at the request or with the encouragement of the owner thereof, in the reasonable expectation of obtaining an interest therein,[d] and who has not expressly or by implication waived his lien,[e] is entitled to a lien on such land to secure the payment or repayment of such money, with interest at 4 *per cent*.[f] Such lien operates as an equitable charge on the land,[g] but not on the title deeds;[h] and the person entitled to the benefit of it has the remedies described in § 1423, *ante*.[i] The benefit of such a lien is transferable.[k]

(a) *Hood* v. *Hood* (1867) 3 Jur. N. S. 684.
Earl St. Germans v. *Crystal Palace Ry. Co.* (1871) L. R. 11 Eq. 568.
Lycett v. *Stafford & Uttoxeter Ry. Co.* (1872) L. R. 13 Eq. 261.
Harding v. *Harding* (1872) *ibid.* 493.
Ecclesiastical Commrs. v. *Penny* [1900] 2 Ch. 736.

(b) *Wythes* v. *Lee* (1855) 3 Drew. 396.
Rose v. *Watson* (1864) 10 H. L. C. 672.
Whitbread & Co. v. *Watt* [1902] 1 Ch. 835.

[The last case shows that the purchaser's right is not lost by the fact that he rescinds the contract under an agreement allowing him to do so.]

(c) *Re Aldred's Estate* (1882) 21 Ch. D. 228.
(d) *D. of Beaufort* v. *Patrick* (1853) 17 Beav. 60.
Unity Joint Stock Bank v. *King* (1858) 25 Beav. 72.
Laird v. *Birkenhead Ry. Co.* (1859) Johns., at p. 511, *per* Wood, V. C.
Middleton v. *Magnay* (1864) 2 H. & M. 233.
Plimmer v. *Mayor of Wellington* (1884) L. R. 9 App. Ca. 699.
(e) *Mackreth* v. *Symmons* (1805) 15 Ves. 329.
Winter v. *Lord Anson* (1828) 3 Russ. 488.
Re Brentwood Brick Co. (1876) 4 Ch. D. 562.

[The usual way of relinquishing a lien by implication is by accepting some other security. But this fact is not conclusive.]

(f) *Turner* v. *Marriott* (1867) L. R. 3 Eq. 744.
Kitton v. *Hewitt* [1904] W. N. 21.

[The costs of any necessary action in which he has been successful may also be added to the lien (*Kitton* v. *Hewitt*, *ubi sup.*).]

(g) *Mackreth* v. *Symmons*, *ubi sup.*
Rice v. *Rice* (1854) 2 Drew. 73.
(h) *Goode* v. *Burton* (1847) 1 Exch. 189 (? since the J. Act).
(i) *Sedgwick* v. *Watford Ry. Co.* (1867) L. J. 36 Ch. 379.

[It is not quite clear whether the lienor is not entitled to a decree for foreclosure, if he prefers it to a decree for sale (*Unity Joint Stock Bank* v. *King* (1858) 25 Beav., at p. 81).]

(k) *Unity Joint Stock Bank* v. *King*, *ubi sup.*

'Clogging the equity'

1427. All the charges described in this Title are subject to the restriction specified in Title II, § 1415, *ante* ('clogging the equity').

De Beers v. *British S. Africa Co.* [1910] 1 Ch. 354.

[The House of Lords ([1912] A. C. 52) held in this case that there was no 'clog.' But the general doctrine was admitted; though there were some doubts expressed as to whether it applied to the case of a floating charge.]

Charges are personalty

1428. All the charges described in this Title are personal property;[(a)] but a debenture comprising a charge on land creates an interest in land within the meaning of section 4 of the Statute of Frauds.[(b)]

(a) There can be little doubt, on general principles, that this is the case with regard to ordinary charges. And it was held in *Re Pryce* (1877) 4 Ch. D. 685, that a debenture was a chose in action, and so, presumably, personal estate.

(b) *Driver* v. *Broad* [1893] 1 Q. B. 744.

[For debentures, see *post*, Sect. XIII, Tit. IV. Debenture stock operating as a general charge on the revenue or income of a going corporation is not within the second part of the above rule (*Re Pickard* [1894] 3 Ch. 704).]

Twelve years' title

1429. Subject to §§ 1432 and 1436, a person who, or whose predecessors in title,[a] has or have taken possession of land under the conditions specified in §§ 1328, 1329, *ante*, and has or have held it for a period of twelve years[b] continuously,[c] acquires the interest in such land of all persons whose title is deemed to be adverse to his (§§ 166, 167, 1329, *ante*); except in so far as he is an express trustee for any such person,[d] and except in so far as any such person is, by reason of any disability, entitled to a longer period in which to substantiate his claim.[e]

(a) *Asher* v. *Whitlock* (1865) L. R. 1 Q. B. 1. (And see § 1332, *ante*.)

(b) Real Property Limitation Act, 1874, s. 1. (Payment of the whole rent under a lease to the original lessor, after a severance of the reversion of which the lessee has no notice, will not bar the right of the assignee of part of the reversion under s. 9 (*Mitchell v. Mosley* (1913) 57 Sol. Jo. 340).)

[It will be observed that the words of the section merely bar the former owner, without conferring title on the adverse possessor. But the effect of s. 34 of the Real Property Limitation Act, 1833, is to extinguish the title of the former owner, and thus to confer title on the possessor, when the title of all rival claimants has been barred (*Atkinson's and Horsell's Contract* [1912] 2 Ch. 1).]

(c) *Trustees' & Exors' Co.* v. *Short* (1888) L. R. 13 App. Ca. 793 (P. C.).

(d) Real Property Limitation Act, 1833, s. 25.
Judicature Act, 1873, s. 25 (2).

[For the extent to which an express trustee may rely upon the Statutes of Limitation, see *ante*, Bk. I, Sect. V, § 164.]

(e) Under this head are included the owners of interests which were still *in futuro* when the adverse possession commenced. (See *post* § 1433, and *ante*, Bk. I, §§ 166 and 167.)

Rent charges

1430. Subject to §§ 1431–1433, no action can be brought, or distress or entry made, by any person (other than the Crown or the Duke of Cornwall) to recover any rent charge, but within twelve years after the last receipt of such rent, or written acknowledgment of the right to receive the same.[a] At the end of such period, the title to the rent passes to the person who has been in adverse receipt of it,[b] or, if it has not been paid at all, it becomes extinct.[c] Not more than six years' arrears of rent (whether rent charge or rent service) may be recovered against the land.[d]

(a) Real Property Limitation Act, 1874, s. 1; 1833, s. 14.

[In spite of the definition clause in the Real Property Limitation Act, 1833, s. 1, it is clear that the word 'rent' in s. 1 of the Act of 1874, and the corresponding s. 2 of the Act of 1833, means a rent charge, not a rent service (*Shaw v. Crompton* [1910] 2 K. B. 370); for an action to recover a rent service is, in effect, an action to recover the land itself (*Grant* v. *Ellis* (1841) 9 M. & W. 113; approved in *Irish Land Commission* v. *Grant* (1884) L. R. 10 App. Ca., at p. 26, *per* Lord Selborne, C.).]

(b) Real Property Limitation Act, 1833, s. 34.

[See, as to this effect, § 1429, n. (b). Presumably, however, where there has been adverse receipt, the rule laid down in *Trustees' & Exors' Co.* v. *Short*, § 1429, n. (c)) applies.]

(c) *Irish Land Commission* v. *Grant, ubi sup.*
(d) Real Property Limitation Act, 1833, s. 42.
Humfrey v. *Gery* (1849) 7 C. B. 567 (rent charge).
Archbold v. *Scully* (1861) 9 H. L. C. 360 (rent service).

[Where there is a personal remedy on a covenant or other specialty, twenty years' arrears can be claimed under it (*Darley* v. *Tennant* (1883) 53 L. T. 257).]

Disabilities

1431. A person who was a minor, idiot, lunatic, or of unsound mind, when adverse possession of his land was taken, or adverse receipt or non-payment of his rent commenced, has a period of six years after the removal of such disability in which to assert his claim, or so much of such period as will make the total period which has elapsed since such adverse possession, receipt, or non-payment commenced, thirty years and no more.

Real Property Limitation Act, 1874, ss. 3, 5.

[Coverture is now no longer a disability; except in the rare cases which do not fall within the Married Women's Property Act, 1882 (*Lowe* v. *Fox* (1885) 15 Q. B. D. 667). And absence beyond seas is in no case a disability (Real Property Limitation Act, 1874, s. 4).]

Corporations

1432. A spiritual or eleemosynary corporation sole has the right to distrain for rent, or to bring an action to recover possession of land, at any time (1) during the continuance of the incumbency (if any) which was in existence at the time when the adverse possession commenced, during the next succeeding incumbency, and during a period of six years from the appointment of a third incumbent, or (2) during the period of sixty years immediately following the commencement of the adverse possession — whichever is the longest.

Real Property Limitation Act, 1833, s. 29.

1433. The rights of owners of future interests to recover the land, or rent, when adverse possession has been taken, or there has been receipt, or non-payment, against the owners of preceding interests, are governed by the provisions of Bk. I, §§ 166, 167, *ante*. *Future interests*

Book I, Section V.

1434. A person who, or whose predecessors in title, has or have presented three successive clerks to an ecclesiastical benefice, or, if the incumbencies of such clerks have not together amounted to sixty years, have exercised the right of presentation thereto for a period of sixty years, acquires the advowson of such benefice,[a] except as against persons for whom he is an express trustee.[b] And, whatever be the length of such incumbencies, if he or they has or have exercised such right during a period of one hundred years, the rights of all former patrons (not being persons for whom the usurper is an express trustee), are barred.[c] *Advowsons*

(a) Real Property Limitation Act, 1833, s. 30.
(b) There is no express provision in the Real Property Limitation Acts to this effect. But, presumably, the general principle applies. (See *Re Cross* (1882) 20 Ch. D., at p. 121, *per* Baggallay, L. J.)
(c) *Ibid.*, s. 33.

[For the purposes of the above §, clerks presented on lapse (*ante*, §§ 1277, 1279) are counted; but not clerks presented by the Crown

on promotion of former incumbents to bishoprics (*ibid.*, s. 31). There is, apparently, no provision for disabilities in the recovery of advowsons; and remaindermen who could have been barred by a tenant-in-tail are bound by the tenant-in-tail's neglect (*ibid.*, s. 32).]

Mortgages

1435. An action to foreclose a mortgage of land is, for the purposes of this Title, an action to recover land;[a] and a mortgagor of land who has been in possession for twelve years without payment of any part of the principal money or interest, and without acknowledgment in writing of the mortgagee's title, acquires the mortgagee's interest, unless he is an express trustee for the latter.[b] When a mortgagee of land has been in possession for twelve years, without giving an acknowledgment in writing to the mortgagor or the person claiming his estate, of the title of the mortgagor, the mortgage cannot be redeemed by the mortgagor or any one claiming through him;[c] whether the mortgagor was or was not under disability when his right to redeem first accrued.[d]

(a) *Wrixon* v. *Vize* (1842) 3 Dr. & W. 104 (Lord St. Leonards).
Heath v. *Pugh* (1881) 6 Q. B. D. 345.
Harlock v. *Ashberry* (1882) 19 Ch. D. 539.

[The reasoning appears to be curious; and the opinion of Lindley, J., in *Heath* v. *Pugh*, at p. 352, that 'a foreclosure decree does not affect possession at all,' is probably the sounder. What if the plaintiff were already in possession?]

(b) Real Property Limitation Act, 1833, ss. 14, 24, 25.
Real Property Limitation Act, 1837.
(c) Real Property Limitation Act, 1874, s. 7.

[For the effect of acknowledgment by or to one of two or more part-claimants, see *ante*, Bk. I, §§ 161, 162.]

(d) *Kinsman* v. *Rouse* (1881) 17 Ch. D. 104.
Forster v. *Patterson*, *ibid.*, 132.

[The effects of acknowledgments of title, and of 'concealed fraud,' by the possessor of land, on the claims of the person out of possession, are dealt with in §§ 160–3, *ante* (Bk. I, Sect. V). To the statements therein contained may be added the observations (*a*) that there seems to be no provision on either of these points for the case of claims to adowsons (*b*) that payment of rent by a lessee prevents any claim by the latter to adverse possession prior to such payment, at any rate against the lessor to whom the payment is made (Real Property Limitation Act, 1833, s. 35), and (*c*) that, even where no rent has been paid for many years, the claim of a lessor for a fixed term revives on the expiry of the term (*Archbold* v. *Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth; *Walter* v. *Yalden* [1902] 2 K. B. 304).]

Crown claims

1436. The right of the Crown, or the Duke of Cornwall, to take proceedings for or in any wise concerning any hereditaments (other than liberties or franchises), is barred by the lapse of sixty years from the accruer of the right or title of the Crown or the Duke respectively,[a] even though such lands have been in charge to the Crown or Duchy respectively within the period of sixty years next before the commencement of such proceedings;[b] unless the Crown or Duchy, or some of its predecessors in title, has or have been answered, by force and virtue of such right or title, the rents, revenues, issues, or profits thereof within the said period.[c] But the title of the Crown or Duchy is not destroyed by the lapse of such period;[d] and, where the interest of the Crown or Duchy has formerly

been in reversion or remainder, such period only begins to run from the time when such reversion or remainder fell into possession, or when, if it had been lawfully created, it would have fallen into possession.[e]

(a) Nullum Tempus Act, 1861, s. 1.
Duchy of Cornwall (Limitation of Time) Act, 1860, s. 1. (The principle had been partially extended to claims of the Duchy by s. 71 of the 7 & 8 Vict. (1844) c. 105.)

(b) Crown Suits Act, 1861, ss. 1, 2. Lands are 'kept in charge' to the Crown or Duchy by being entered on the annual returns drawn up by the revenue officials; even where the returns for the lands are '*Nil.*' (*A.-G.* v. *Maxwell* (1814) 8 Price, 76 n.; *A.-G.* v. *Eardley* (1820) *ibid.*, 39). The return thus stands '*insuper* of record.'

(c) Answering of revenues, or putting in charge, or standing *insuper* of record, of any honour, manor, tenement, or other hereditament, does not affect any part or parcel of it (? held by a different title) (Crown Suits Act, 1861, s. 3).

(d) *Goodtitle* v. *Baldwin* (1809) 11 East, at p. 495, *per* Lord Ellenborough, C. J. (Therefore the occupier does not acquire a title as against the Crown; though, probably, he does as against a Crown lessee or grantee (*Doe* v. *Morris* (1835) 2 Bing. N. C. 189).)

(e) Nullum Tempus Act, 1768, ss. 3, 4.
Duchy of Cornwall (Limitation of Time) Act, 1860, s. 1.

['Possession' here probably includes receipt or enjoyment of profits or easements.]

NOTE

There appears to be no statutory period of limitation, except as to advowsons (*ante*, § 1434), and, under the last §, for Crown claims, for claims to purely incorporeal hereditaments (*ante*, Sect. I, Tit. IX). But absence of enjoyment or user during a considerable period may be some evidence of a release or abandonment of the right (*Crossley* v. *Lightowler* (1867) L. R. 2 Ch. App., at p. 482). There was no statutory bar (other than that, if any, created by the Nullum Tempus Act, for the Crown) to claims for recovery of tithe against the tithe-payer; but the latter could prescribe for exemption or a *modus* (see Tithe Prescription Act, 1832). Apparently, the title to tithe rent charge can now never be barred by lapse of time; but not more than two years' arrears can be recovered (Tithe Act, 1836, s. 81, and *ante*, Sect. I, Tit. IX, §§ 1282–3).

Immemorial user

1437. Subject to § 1202 (note) *ante*, and § 1441 *post*, any franchise, easement, profit, or rent charge (other than a tithe rent charge),[a] which might lawfully have been created by grant,[b] may be acquired by any person by immemorial user,[c] without proof of express title.[d] For the purposes of this doctrine, 'immemorial user' means user from the first year of Richard I (1189).[e]

(a) A claim to a rent service would, in effect, be a claim to an estate, present or future, in the land; because rent service is always incident to a reversion. And no estate or corporeal hereditament can be claimed by prescription. Apparently, there can be no prescription in respect of a tithe rent charge; because its origin is known, and, moreover, it could not have been created by grant.

(b) *Abbot of Strata Marcella's Case* (1591) 9 Rep., at 25 b.
Foxley's Case (1601) 5 Rep., at 109 b, 110 a.
Gardner v. *Hodgson's Brewery* [1903] A. C., at p. 239, *per* Lord Lindley.

(c) As prescription can only be for rights which lie in grant, no vague or unincorporated body, such as 'inhabitants,' or 'dwellers' can prescribe; because such bodies are incapable of receiving grants (*Constable* v. *Nicholson* (1863) 14 C. B. N. S. 230).

(d) Co. Litt. 113–15 (generally).
The King v. *Talbot* (1633) Cro. Car. 311; *Mayor of Yarmouth* v. *Eaton* (1763) 3 Burr. 1402 } (franchises).
Luttrel's Case (1601) 4 Rep. 86 a; *Popham* v. *Woolcot* (1666) 1 Sid. 291 } (easements).
Costara's and Wingfield's Case (1588) 2 Leon. 44; *Dickins* v. *Hampstead* (1729) Fitz. 87 } (profits).
Y. B. (1339) 13 Ass. fo. 39, pl. 4; *Stephens* v. *Lewis* (1599) Cro. Eliz. 673 } (rents).

[The reported cases of prescription for rent charge are extremely rare; but it seems to have been assumed in *Sir Moyle Finch's Case*

(1606) 6 Rep., at 65 b, that a rent charge could be prescribed for. The Y. B. case expressly raises the distinction between rent service and rent charge.]

(e) Co. Litt. 115 a.

[Proof of user continuous, peaceful, open, and as of right, for a period of not less than twenty years may give rise to a presumption of immemorial user, in the absence of inconsistent circumstances, e. g. proof of commencement since 1189 (*Hill* v. *Smith* (1809) 10 East, 475; Prescription Act, 1832, preamble).]

Presumption of lost grant

1438. Even where immemorial user is not proved, proof of user continuous, peaceful, open, and as of right,[a] for a period of twenty years, by the claimant, or his predecessors in title, will (subject to § 1439) raise a presumption that the right claimed was granted to the claimant or his predecessor in title, by a person lawfully entitled to make such grant.[b]

(a) *Monmouth Canal Co.* v. *Harford* (1834) 1 C. M. & R. 614 (interrupted).
Eaton v. *Swansea Waterworks Co.* (1851) 17 Q. B. 267 (contentious).
Dalton v. *Angus* (1881) L. R. 6 App. Ca., at p. 812, *per* Lord Blackburn (generally).
Burrows v. *Lang* [1901] 2 Ch. 502 (permissive).
Union Lighterage Co. v. *Graving Dock Co.* [1902] 2 Ch. 557 (secret).

(b) *Bright* v. *Walker* (1834) 1 C. M. & R., at pp. 217–8, *per* Parke, B.
Bryant v. *Lefever* (1879) 4 C. P. D., at p. 177, *per* Bramwell, B.; approved in
Dalton v. *Angus* (1881) L. R. 6 App. Ca., at p. 816, *per* Lord Blackburn.
Haigh v. *West* [1893] 2 Q. B. 19.

[In *Haigh* v. *West* (subsequently referred to with approval by Cozens-Hardy, J., in *Brown* v. *Dunstable Corporation* [1899] 2 Ch., at p. 387) the presumption was raised in favour of a claim of a corporeal hereditament. But the general doctrine was fully admitted.]

Evidence to rebut

1439. (Probably) direct evidence may not be adduced to show that no grant such as that described in § 1438 was in fact made.[a] But the presumption of a lost grant will not be raised if there is anything in the circumstances of the case which would make such a grant impossible,[b] or unlawful,[c] or inconsistent with a lawful custom,[d] or where the user relied on is capable of other explanation.[e]

(a) On this point there seems to be much difference of opinion. See the views of the different judges and learned lords in the various stages of *Dalton* v. *Angus* (1877) 3 Q. B. D., at p. 130; (1878) 4 Q. B. D., at pp. 172, 183, 187, 201; (1881) L. R. 6 App. Ca., at pp. 765, 783, 812. The older view clearly was that the presumption of the lost grant could be rebutted (see notes to *Yard* v. *Ford*, in Wms. Saund. (ed. 1845) II, 175, c).

(b) e. g. where the presumed grantor or the presumed grantee was incapable of making or receiving such a grant (*Barker* v. *Richardson* (1821) 4 B. & Ald. 579 (rector); *A.-G.* v. *G. N. Raily. Co.* [1909] 1 Ch., at p. 778, *per* Neville, J. (corporation); *National Manure Co.* v. *Donald* (1859) 4 H. & N. 8 (corporation)).

(c) e. g. as being contrary to a public Act of Parliament (*Neaverson* v. *Peterborough Council* [1902] 1 Ch. 557); or creating a public nuisance (*Mott* v. *Shoolbred* (1875) L. R. 20 Eq. 22).

(d) *Perry* v. *Eames* [1891] 1 Ch., at p. 667, *per* Chitty, J.

(e) *Wheaton* v. *Maple & Co.* [1893] 3 Ch. 48.
A.-G. v. *Horner* (1912) 107 L. T., at p. 550, *per* Warrington, J.

Prescriptive rights perpetual

1440. A right acquired by prescription is perpetual.

Wheaton v. *Maple & Co.*, *ubi sup.*

Appendant rights

1441. Appendant rights (*ante*, § 1190) cannot be claimed by prescription.

Pill v. *Towers* (1600) Cro. Eliz. 791. (The reason is, that appendant rights are not supposed to have arisen by grant.)

Prescription against the Crown

1442. (*Semble*) a claim by prescription can (subject to § 1449) be enforced against the Crown, even apart from statute, if the circumstances warrant the presumption of immemorial user or a lost grant.

Wheaton v. *Maple & Co.* [1893] 3 Ch. 48.

[This seems to be the true view; in spite of the *dicta* of text-book writers. Indeed, it is difficult to see how, on any other view, franchises could have been acquired by prescription. There is a well-known exception in the case of claims to light under the Prescription Act, 1832 (*post*, § 1449).]

Non-user

1443. A right to an easement or profit, once acquired by prescription or otherwise, cannot be lost by mere non-exercise without abandonment.

Co. Litt. 114 b.
Nowell v. *Hicks* (1601) *ibid.*
Crossley v. *Lightowler* (1867) L. R. 2 Ch. App., at p. 482.

Presumption under the Act

1444. Independently of the presumption of immemorial user or a lost grant, when any easement (other than access of light to a building),[a] of a kind recognized by law, has been actually enjoyed by a person claiming right thereto, without interruption during at least a year,[b] for a period of twenty years next before the commencement of some action in which such right has been brought in question,[c] such claim cannot be defeated, even by the Crown or the Duke of Cornwall, merely by showing that such easement was

first enjoyed at a time prior to such twenty years.[d] A similar rule holds when a similar actual enjoyment of any profit *à prendre* appurtenant[e] (other than rent, services, or tithe rent charge) has existed for thirty years.[f] Enjoyment for a shorter period raises no presumption in favour of the claim.[g]

(a) *Perry* v. *Eames* [1891] 1 Ch. 658.
Wheaton v. *Maple & Co.* [1893] 3 Ch. 48.

[These cases definitely decided that s. 3 of the Prescription Act, 1832 (right to light), does not apply to claims against the Crown.]

(b) Prescription Act, 1832, s. 4.

[The interruption, to be effective, must be adverse and acquiesced in, i. e. the attention of the person claiming the easement or profit must have been directed to the adverse character of the interruption; and he must have failed to protest or take proceedings (*Glover* v. *Coleman* (1874) L. R. 10 C. P. 108; *Seddon* v. *Bank of Bolton* (1882) 19 Ch. D. 462).]

(c) Prescription Act, 1832, s. 4.
(d) *Ibid.*, s. 2.
(e) *Shuttleworth* v. *Le Fleming* (1865) 19 C. B. N. S. 687, laid it down that profits in gross are not within the scope of the Prescription Act.
(f) Prescription Act, 1832, s. 1.
(g) *Ibid.*, s. 6.

Absolute title under the Act

1445. When an easement of the kind described in § 1444 has been enjoyed in the manner described in such §, for a period of forty years calculated as described in the said §, or when a profit of the kind described in such § has been taken in such manner for a period of sixty years so calculated, the right

thereto is deemed absolute and indefeasible; unless it appears that such easement or profit was enjoyed or taken by express consent or agreement by deed or writing.

Prescription Act, 1832, ss. 1, 2.

[The consent or agreement need not be signed by the owner of the alleged servient tenement (*Bewley* v. *Atkinson* (1879) 13 Ch. D. 283). *Quære:* would an agreement not inconsistent with the claim deprive the claimant of the protection of the statute?]

Common landlord

1446. No person can acquire a right under §§ 1444 or 1445, by virtue of enjoyment or taking as against a lessee whose lessor is also lessor of the tenement occupied by the claimant and his predecessors in title, in respect of which such right is claimed.

Gayford v. *Moffatt* (1868) L. R. 4 Ch. App. 133.
Kilgour v. *Gaddes* [1904] 1 K. B. 457.

[Such a claim would, in effect, be a claim of adverse enjoyment against the claimant's own lessor, which is contrary to the principle of tenure (*Gayford* v. *Moffatt*, *ubi sup.*, at p. 135, *per* Lord Cairns, C.).]

Disabilities

1447. In cases of claims under § 1444 (but not of claims under § 1445), the time during which the person entitled to resist the claim is an infant, idiot, *non compos mentis*, *feme covert*,[a] or tenant for life,[b] or during which any action (? involving title to the alleged servient tenement) has been diligently prosecuted,[c] is excluded in computing the periods re-

ferred to in such § 1444;[d] and enjoyment or taking interrupted only by such disabilities will be deemed continuous.[e]

(a) Probably, as regards a *feme covert*, this section is in effect repealed by the Married Women's Property Act, 1882, in cases to which that Act applies.

(b) Unless the provisions of the next § are held (contrary to the express words of s. 8) to apply to all claims (other than claims to light) under the Act, there would seem to be a gross omission here in respect of profits *à prendre* claimed by virtue of enjoyment against tenants for years. In prescription at the common law, enjoyment against a lessee for years was ineffectual; because such lessee could not have granted a right which would have bound his lessor.

(c) Some restriction must be applied to the vague words of the section. But it is difficult to know whether the action referred to is supposed to have been an action to contest the claim in question, or an action involving title to the servient tenement.

(d) Prescription Act, 1832, s. 7.

(e) *Clayton* v. *Corby* (1842) 2 Q. B. 813. (But a *de facto* interruption by the person under disability breaks the continuity of the enjoyment by the claimant (*Ibid.*, at p. 825, *per* Lord Denman, C. J.).)

Leases

1448. When the servient tenement in respect of which a claim to a 'way or other convenient watercourse or use of water' is put forward under the Prescription Act, 1832, has been held for any term of life or any term of years exceeding three from the granting thereof, the time of enjoyment of such 'way or other matter' during the continuance of such term, will be excluded in the computation of the period of forty years described in § 1445, in case the claim is resisted by a reversioner (but not a remainderman)[a] expectant on the determination of

such term, within three years from the determination thereof.[b]

(a) *Laird* v. *Briggs* (1881) 19 Ch. D., at p. 30, *per* Jessel, M. R. *Symons* v. *Leaker* (1885) 15 Q. B. D. 629.
(b) Prescription Act, 1832, s. 8.

[The wording of s. 8 is even more open to criticism than that of the other sections of the Prescription Act. It has been suggested (*Laird* v. *Briggs*, *ubi sup.*, at p. 33) that the word 'convenient' in line 2 of the § should read 'easement'; but the change would hardly make the section a model of the draftsman's art, and the point has been expressly left open by the C. A. (*ibid.*). The suggestion of Manisty, J., in *Symonds* v. *Leaker*, *ubi sup.*, at p. 634, to the effect that s. 8 applies to claims of light under s. 3, seems wholly inconsistent with the wording of s. 8, which refers exclusively to 'the said period of *forty* years.']

Claims of light

1449. Where the access of light to a building has been actually enjoyed therewith[a] for the full period of twenty years without interruption, calculated as described in § 1444,[b] the right thereto is (subject to § 1244, *ante*)[c] deemed absolute and indefeasible, except as against the Crown and its tenants;[d] unless it appears that the same was enjoyed by some written consent or agreement expressly made or given for that purpose.[e]

(a) Enjoyment as of right is not necessary, if the permission does not satisfy the requirements of the section (*Bewley* v. *Atkinson* (1879) 13 Ch. D., at p. 296, *per* Thesiger, L. J.; *Hyman* v. *Van den Bergh* [1907] 2 Ch., at p. 530, *per* Parker, J.).
(b) Prescription Act, 1832, s. 4.
Hyman v. *Van den Bergh* [1908] 1 Ch. 167. It has been held, however, (*Simper* v. *Foley* (1862) 2 J. & H. 555; *Ladyman* v. *Grave* (1871) L. R. 6 Ch. App., at p. 768, *per* Lord Hatherley, C.), that when the enjoyment has been suspended by unity of possession, enjoyment prior to the suspension may be added to

the period immediately following its removal. But see these cases criticized by Farwell, L. J., and Parker, J., in *Hyman* v. *Van den Bergh, ubi sup.*

(c) i. e., only a reasonable quantity of light can be claimed. (See § 1244 for details.)

(d) *Perry* v. *Eames* [1891] 1 Ch. 658.
Wheaton v. *Maple & Co.* [1893] 3 Ch. 48.

(e) Prescription Act, 1832, s. 3. (The consent or agreement need not be signed by the owner of the alleged servient tenement (*Bewley* v. *Atkinson, ubi sup.*). *Quære:* would an agreement not inconsistent with the claim deprive the claimant of the protection of the statute?)

Even against common landlord

1450. A claim of light under § 1449 can be maintained, even though, during the whole of the alleged period of enjoyment, the servient tenement has been in the occupation of a lessee of the person who is also owner in fee of the tenement to which the right is claimed as appurtenant.

Morgan v. *Fear* [1907] A. C. 425.
Richardson v. *Graham* [1908] 1 K. B. 39.

[*A fortiori*, the right can be secured by enjoyment against the lessee of a stranger (*Simper* v. *Foley* (1862) 2 J. & H. 555).]

Local custom

1451. A claim of light may be maintained under § 1449; notwithstanding that it is inconsistent with a local usage or custom.

Prescription Act, 1832, s. 3.

[Thus, for example, it overrides the custom of London, to the effect that the owner of an ancient building may pull it down and erect another of any height, notwithstanding any claim of light by a neighbour (*Salters Co.* v. *Jay* (1842) 3 Q. B. 109; *Truscott* v. *Merchant Tailors' Co.* (1856) 11 Ex. 855).]

Proof of custom

1452. An immemorial custom, which will create a right over land of the kind described in Sect. I, Tit. X, *ante*, may be proved by evidence showing usage, long,[a] continuous,[b] and peaceable, and not explained by causes inconsistent with the existence of the alleged custom.[c] (*Semble*) the Prescription Act, 1832, has no application to proof of custom.[d]

(a) The period suggested by the cases is at least fifty years, *i. e.* the average memory of the 'oldest inhabitant' (*Hammerton* v. *Honey* (1876) 24 W. R., at p. 604, *per* Jessel, M. R.).

[In *Brocklebank* v. *Thompson* [1903] 2 Ch., at p. 350, Joyce, J., suggested that twenty years might be sufficient; and referred to *R.* v. *Joliffe* (1823) 2 B. & C. 54. But *R.* v. *Joliffe* was not a case of rights over land.]

(b) *Bastard* v. *Smith* (1837) 2 Moo. & R., at p. 136, *per* Tindal, C. J.
Hammerton v. *Honey*, *ubi sup.*
Mercer v. *Denne* [1905] 2 Ch. 538.
(c) *Simpson* v. *Wells* (1872) L. R. 7 Q. B. 214.
(d) *Mounsey* v. *Ismay* (1865) 3 H. & C. 486.
Shuttleworth v. *Le Fleming* [1865] 19 C. B. N. S. 687.

[The view of the Court in these cases was, that rights in gross were not contemplated by the framers of the Prescription Act. But might not appurtenant rights be claimed by custom? And, whether this be so or not, the view of the Courts which decided the two last mentioned cases has been questioned by the Court of Appeal (*Mercer* v. *Denne*, *ubi sup.*, at p. 586). Probably, customary rights (other than those arising out of copyhold tenure) are not alienable.]

SECTION V

INVOLUNTARY ALIENATION OF LAND

Adjudication in bankruptcy

1453. Upon an adjudication in bankruptcy, all the property of the bankrupt (including the capacity to exercise for his own benefit any power of disposition, other than the nomination to a vacant ecclesiastical benefice)[a] passes to his trustee in bankruptcy;[b] and the title of the trustee, subject to the claims of *bonâ fide* purchasers for value before the date of the receiving order,[c] relates back to the commencement of the bankruptcy.[d] All property and powers, of the kind above described, acquired by the bankrupt prior to his discharge, likewise pass to the trustee, in manner and subject to the exceptions specified in Bk. I, § 70, *ante*.[e]

(a) Bankruptcy Act, 1883, s. 44.

[All property held by the bankrupt as trustee for other persons is expressly excepted by the Act (s. 44 (1)). There is some doubt whether the section covers special powers of appointment. It has been held not to apply to a release of such a power (*Re Rose* [1904] 2 Ch. 348). But the order was discharged on appeal, by consent; on the ground that all parties were not represented (*Re Rose* [1905] 1 Ch. 94).]

(b) *Ibid.*, s. 20 (1).

[Upon the making of the receiving order, the property passes into the custody of, but does not vest in, the official receiver (*Ibid.* s. 9).]

(c) *Ibid.* s. 49 (c).

[Probably the protection of this s. is not confined to purchasers who take directly from the bankrupt (*Re Slobodinsky* [1903] 2 K. B., at p. 532, *per* Wright, J.). It certainly is not so confined in the case of a voluntary settlement, sought to be set aside under s. 47 of the Act (*Re Hart* [1912] 3 K. B. 6); though in that case there is no express saving to that effect in the section.]

(d) *Ibid.*, s. 43. (By this section, the commencement of the bankruptcy is to be deemed to be the committing of the act of bankruptcy upon which the receiving order was made, or, if the bankrupt has committed more acts of bankruptcy than one, then the first within three months prior to the presentation of the bankruptcy petition.)

(e) *Ibid.*, s. 44 (i) (ii).

Disclaimer of onerous property

1454. Any lease or other interest in land burdened with onerous covenants, belonging to the bankrupt, and any property of the bankrupt that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, may be disclaimed in writing by the trustee at any time within twelve months after the first appointment of a trustee (in that bankruptcy),[a] or, if the existence of such interest has not come to the knowledge of the trustee within one month after such appointment, then, within twelve months after he first became aware thereof.[b] But a trustee in bankruptcy may not: —

(i) disclaim any lease, otherwise than in accordance with General Rules made under the Bankruptcy Acts, without the leave of the Court; and the Court may, before granting leave, impose such conditions and make such orders as it thinks just; (c)

(ii) disclaim any property, when an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the trustee has, for a period of twenty-eight days after receipt of the application (or such extended period as may be allowed by the Court), failed to give notice whether he disclaims or not. (d)

(a) The words in brackets are not in the Act; but, presumably, they must be implied.

(b) Bankruptcy Act, 1883, s. 55 (1).
Bankruptcy Act, 1890, s. 13. (The Court may extend the period.)

(c) Bankruptcy Act, 1883, s. 55 (3). The effect of Rule 69 of the Bankruptcy Rules, 1890, is, that a lease may be disclaimed without leave when (i) the premises have not been sublet or mortgaged by the bankrupt, *and either* the rent and value of the premises as assessed for property tax are less than £20 a year, *or* the estate is administered as a 'small bankruptcy' under s. 121, *or* the trustee gives notice to the lessor of his intention and the lessor does not, within seven days, give a counter-notice requiring the matter to be brought before the Court, or when (ii) the bankrupt has sublet or mortgaged, and neither the lessor nor the sublessee or mortgagee, after fourteen days' notice, requires the matter to be brought before the Court. In other cases, a disclaimer without leave is void (R. 320 (3)).

(d) *Ibid.*, s. 55 (4).

Effect of disclaimer

1455. A disclaimer under § 1454 operates to extinguish the rights, interests, and liabilities of the bankrupt in respect of the property disclaimed, as from its date, and to discharge the personal liability of the trustee as from the date when the property vested in him; but not otherwise to affect the rights or liabilities of other persons.

Bankruptcy Act, 1883, s. 55 (2).

[Of course all parties injured by the disclaimer may prove against the estate of the bankrupt to the extent of such injury (*ibid.*, s. 55 (7)).]

Vesting orders

1456. The Court may, on application by any person interested in, or remaining affected by, any liability in respect of the property disclaimed, vest the property in any person entitled thereto, on such terms as the Court may think just. But where the property is of a leasehold nature, the Court may not vest it in any person claiming under the bankrupt, except upon the terms of making such person liable to perform the obligations which were incumbent on the bankrupt in respect of such property at the time of the presentation of the bankruptcy petition.

Ibid., s. 55 (6).

[Any mortgagee or sub-lessee of the bankrupt refusing to accept a vesting order in such terms, may be excluded from all interest in the property, which may then be vested in any person liable on the lessee's covenants, freed from all interests therein created by the bankrupt (*ibid.*). The terms mentioned in the § may, however, be modified to a certain extent by the Court (Bankruptcy Act, 1890, s. 13).]

1457. All present interests in land belonging to a judgment debtor, including estates tail, can be taken in execution, and realized to satisfy a judgment of the High Court. *Execution*

Judgments Act, 1838, ss. 11, 13.

[The methods of execution are, however, various. Thus, ordinary freehold and copyhold legal estates in possession, including estates tail (which, under the Statute of Westminster II, were only extendible during the life of the tenant in tail (*Anderson's Case* (1597) 7 Rep., at 21 b)) and including estates held in trust exclusively for the debtor, can be seized by the sheriff under an Elegit, and handed over to the creditor, who holds them until the revenues have satisfied his claim (Judgments Act, 1838, ss. 11, 13), or, if he prefers, may obtain an order for sale (*ibid.*, s. 13). Legal estates for years, but, probably, not even simple trusts of such estates (*Re D. of Newcastle* (1869) L. R. 8 Eq., at p. 707, *per* Lord Romilly, M. R.) can be sold by the sheriff as chattels under a writ of Fi. Fa., and the proceeds employed in discharge of the debt (*Taylor* v. *Cole* (1789) 3 T. R. 292); and (probably) legal estates for years may also be seized under an Elegit (*Fleetwood's Case* (1610) 8 Rep., at 171 a). Equities of redemption, and trusts of estates for years, can be taken in execution by the appointment of a receiver, and subsequent sale under s. 13 of the Judgments Act, 1838, which is expressed to apply to all kinds of interests in land, present and future, including incorporeal hereditaments and powers of appointment for the debtor's own benefit (*Harris* v. *Davison* (1846) 15 Sim. 128). The provision of s. 13, to the effect that no sale should be allowed till one year after the execution, was abolished by s. 4 of the Judgments Act, 1864; and it has been more than once judicially suggested (*Re D. of Newcastle*, *ubi sup.*, at p. 706; *Re Bailey's Trusts* (1869) 38 L. J. Ch., at p. 239, *per* Malins, V. C.), that the latter enactment has, though in some respects more narrowly worded, repealed the former. Notwithstanding the wide words of s. 13, a receiver will not be appointed of a future legal estate, or, at least, if he is appointed, his appointment will not be a 'delivery in execution' of such estate (*Re Harrison and Bottomley* [1899] 1 Ch. 465); and it is quite certain that a future legal estate cannot be taken under an Elegit (*Re South* (1874) L. R. 9 Ch. App. 369). It would seem, therefore, that, a delivery in execution being an essential pre-requisite of an order for sale,

there are no means of realizing such an interest. A County Court cannot issue direct execution against land; but a County Court judgment for upwards of £20 (exclusive of costs) may, in default of goods, be removed by Certiorari into the High Court, and enforced as a High Court judgment (County Courts Act, 1888, s. 151). The Crown enjoys the special privilege of seizing the lands of its debtor, and even of his debtors, without first proceeding to judgment, by writ of extent (33 Hen. VIII (1541) c. 39, s. 37; *B. of Rochester* v. *Le Fanu* [1906] 2 Ch., at p. 518, *per* Swinfen Eady, J.).]

Registration necessary

1458. No judgment or Crown debt affects any land; until and unless a writ or order for the purpose of enforcing it is for the time being registered under the Land Charges Registration and Searches Act, 1888, s. 5.

Land Charges Act, 1900, s. 2.

[In *Johnson* v. *Burgess* (1873) L. R. 15 Eq. 398, it was laid down by James, L. J., that a registered writ of sequestration, though actually enforced by seizure of the sequestered person's real estate, was not a delivery in execution within the meaning of the Judgments Act, 1864. But it is to be observed that the Land Charges, &c., Act, 1888, s. 5 (1) makes provision for the registration of orders appointing sequestrators of land.]

Disclaimer

1459. Any legal estate may be forfeited by disclaimer, on the part of the tenant, of the lord's title, in manner and subject to the reservations contained in § 1039 (iii), *ante*, and, in the case of a copyhold estate, by any breach of custom for which a forfeiture is the customary penalty (*ante*, Sect. I, Tit. V, 1092, 1095).

Forfeiture

1460. Any estate may be forfeited by breach of express condition, in manner, and subject to the restrictions, described in Sect. III, Tit. I, §§ 1368–1374, *ante*.

Mortmain

1461. An unlawful conveyance to a corporation in mortmain (*post*, Sect. VII, Tit. III) works a forfeiture to the Crown of the interest conveyed, subject to the rights of mesne lords (if any), but does not affect any rent or service due in respect of such interest.

Mortmain and Charitable Uses Act, 1888, ss. 1, 3.

[The theory is, that an unlawful assurance in mortmain works a forfeiture to the immediate lord; and, until the passing of the 7 & 8 Will. III (1696) c. 37, the licence of the Crown alone was not sufficient to authorize the assurance. But owing to the operation of the statute *Quia Emptores* (*ante*, § 1174, n. (a)), it is, in most cases, impossible to identify the mesne lords of a freehold fee simple; and the Crown takes in default of claim by mesne lords. The rights of the latter are specified in subs. 2, of s. 1 of the Act of 1888. Alienation of land for charitable purposes, which does not work a forfeiture, is dealt with under Sect. VII, Tit. IV, *post*.]

Simony

1462. Any agreement concerning an advowson or next presentation to an ecclesiastical benefice, made with a view of procuring a corrupt nomination to the benefice, works a forfeiture of the next presentation to the Crown.

31 Eliz. (1589) c. 6, s. 4.
The King v. *The Bishop of Oxford* (1806) 7 East, 600.

[Most of the merely technical forms of simony, which grew up from the interpretation of the Elizabethan statutes, have ceased to exist as the result of the passing of the Benefices Act, 1898 (*ante*, Sect. I, Tit. IX, §§ 1271–3). But it is conceived that actual corrupt bargains still entail the old penalty.]

SECTION VI

OVERRIDING POWERS AFFECTING LAND

TITLE I — POWERS OF APPOINTMENT

Classes of powers

1463. A power of disposing of an interest in land may be conferred on any person;[a] whether such person has any interest in such land or not.[b] If the donee of the power has no interest in the land, such power is a power 'collateral.'[c] If the donee has an interest, but it would not be affected by the exercise of the power, such a power is 'in gross.'[d] If the donee's interest would be affected by the exercise of the power, such a power is 'appendant.'[e]

(a) It seems to be generally assumed, that a power to dispose of land can only be created by deed or testament. But, regard being had to the history of powers (see note below), it is difficult to find any express authority for the restriction. Perhaps, however, though a power is not a trust (*A.-G.* v. *Downing* (1767) Wilmot, at p. 23; *Dickenson* v. *Teasdale* (1862) 1 De G. J. & S., at p. 60, *per* Lord Westbury, C.), yet, inasmuch as it would be difficult to create a power of appointment otherwise than by means of a trust, s. 7 of the Statute of Frauds (1677) might be held to require writing.

(b) There was at one time a doctrine that a power of disposition could not exist separately in an owner in fee. But this doubt was dispelled in *Sir Edward Clere's Case* (1599) 6 Rep. 17 b; followed by Lord Eldon in *Maundrell* v. *Maundrell* (1804) 10 Ves. 246.

(c) *Edwards* v. *Slater* (1665) Hardr., at p. 413, *per* Hale, C. B. *Dickenson* v. *Teasdale*, *ubi sup.*, at p. 59, *per* Lord Westbury, C.

(d) *Re D'Angibau* (1880) 15 Ch. D., at p. 232, *per* Jessel, M. R. *Nottidge* v. *Dering* [1909] 2 Ch. 647.

(e) *Penne* v. *Peacock* (1734) Ca. *temp.* Talb. 41. (The expression 'appendant' does not, however, appear in the report.) *Re D'Angibau*, *ubi sup.*

[The Common Law courts knew, in a limited class of cases, of powers of disposition over the legal estate in land, e. g., the power which a landowner, under local custom, might confer on his executors, to sell his lands for the payment of his debts or other purposes. After the passing of the Statute of Wills, 1540, such 'common law' powers were created by testators independently of custom; and were in familiar use until the passing of the Land Transfer Act, 1897, though they could only be employed to create 'common law' estates, i. e., estates such as could have been limited by feoffment or other common law conveyance. But there can be little doubt that, historically speaking, the bulk of the modern powers of appointment or disposition of land are derived from the practice, early established, of conveying lands to feoffees, to hold upon the uses to be declared by the donor's testament. The subsequent testament was, in effect, a declaration of uses, which, before 1535, were, of course, purely equitable. The passing of the Statute of Uses, in that year, put a temporary stop to the exercise of powers of appointment of land by testament. But it only rendered more efficacious the exercise of powers *inter vivos*; and, after the passing of the Statute of Wills, in 1540, the practice of appointing by testament revived. 'Equitable' powers, or powers which only enable the donee to appoint equitable interests, are, however, still recognized; and, when they are duly exercised, the owners of the legal estate must convey in accordance with the appointment (*Re Brown* (1886) 32 Ch. D., at p. 601, *per* Kay, J.). For the important differences between the effect of the exercise of legal and of equitable powers, see *Cloutte* v. *Storey* [1911] 1 Ch. 18.]

General and special powers

1464. Powers of appointment are either 'general,' where the donee may exercise them in favour of any persons he pleases;[a] or 'special,' where the donee may only exercise the power in favour of a limited class of persons.[b] The donee of a general power may exercise it in his own favour, or in favour of the donee's wife or husband.[c]

(a) *Mackinley* v. *Sison* (1837) 8 Sim. 561.
Bristow v. *Skirrow* (1859) 27 Beav. 585.
(b) *Bristow* v. *Warde* (1794) 2 Ves. 336.

(c) *Holder* v. *Freston* (1769) 2 Wils. K. B., at p. 402, *per Curiam.*
Irwin v. *Farrer* (1812) 19 Ves. 86.
Wood v. *Wood* (1870) L. R. 10 Eq. 220.

[A general power of appointment is, for most purposes, equivalent to ownership, and is treated as such. It passes (if exerciseable by act *inter vivos*) to the donee's trustee in bankruptcy for the benefit of his creditors (*ante*, § 1453); and, if exercised by his testament, it makes the property appointed assets for payment of his debts after his death (*post*, Bk. V).]

Form of appointment

1465. Generally speaking, a power of appointment can only be exercised in manner and with the formalities prescribed by the settlement creating the power, and by an act intended to exercise the power.

Hughes v. *Wells* (1852) 9 Ha., at p. 763, *per* Turner, V. C.
Re Sanderson [1912] W. N. 54.

But:—

(i) a power to appoint by testament must be exercised (if at all) by a document conforming to the requirements of the Wills Act, 1837; and a testamentary power so exercised will, as respects the execution and attestation thereof, be valid;

Wills Act, 1837, s. 10.

(ii) a power to appoint by deed or writing not testamentary will be validly exercised, so far as execution and attestation are concerned, by an appointment made by deed attested by two or more witnesses in the

manner in which deeds are ordinarily attested;

Law of Property Amendment Act, 1859, s. 12.

[Of course, all additional requirements of substance, e. g. the consent of a third party, must be fulfilled.]

(iii) a general devise or bequest of the real or personal estate of the testator, or of his real or personal estate in any place, or in the occupation of any person mentioned in his testament, or otherwise described in a general manner, will be construed to include any estate, or any estate to which such description may extend, which he may have power to appoint in any manner that he may think proper, unless a contrary intention appears by the testament;

Wills Act, 1837, s. 27.

[It should be noted that, while no power that is not 'general,' in the sense of § 1463, can fall within this s. of the Wills Act (*Re Williams* (1889) 42 Ch. D. 93), yet it is not every such power which does fall within it; e. g. a settlor may impose restrictions of form on the exercise of a general power, which exclude the operation of the s. (*Phillips* v. *Cayley* (1889) 43 Ch. D. 222; *Re Davies* [1892] 3 Ch. 63). A more difficult problem arises when an attempted exercise of a general testamentary power fails by reason of the death of the appointee before the testator, or for any other reason. Is the fund then assets for payment of the testator's debts and legacies? The answer depends upon whether the testator is deemed to have 'made the fund his own for all purposes' (*Re Marten* [1902] 1 Ch. 314). It seems now to be settled, that a mere appointment of an executor, followed by a direction to pay debts and legacies, will be a sufficient exercise of the power to make the fund assets (*Re Seabrook* [1911] 1 Ch. 151).]

(iv) the Court, in its discretion, may, where the appointor's intention is clear,[a] supply any want or defect[b] in the exercise of the power, not going to the substance thereof,[c] in favour of creditors,[d] purchasers,[e] a wife,[f] or blood relatives of the donee of the power,[g] or charities.[h]

(a) *Carver* v. *Richards* (1859) 27 Beav., at p. 495, *per* Romilly, M. R.

(b) *Cockerell* v. *Cholmeley* (1830) 1 Russ. & M., at p. 424, *per* Leach, M. R.

(c) Thus, though the Court may support an exercise by testament instead of by deed (*Sneed* v. *Sneed* (1747) 1 Ambl. 64), the converse will not hold; because, by executing a deed, the donee relinquishes that power of revocation which the settlor intended him to retain until his death (*Reid* v. *Shergold* (1805) 10 Ves. 370). Nor will Equity ever supply the non-exercise of a power (*Buckell* v. *Blenkhorn* (1845) 5 Ha. 131); unless, possibly, where the exercise has been prevented by the fraud of a party taking in default of appointment.

(d) *Pollard* v. *Greenvil* (1662) 1 Ca. Cha. 10.
Wilkie v. *Holme* (1752)1 Dick. 165.

(e) *Cotter* v. *Layer* (1731) 2 P. Wms. 623.
Re Dykes' Estate (1869) L. R. 7 Eq. 337.

(f) *Tollet* v. *Tollet* (1728) 2 P. Wms. 489.
Chapman v. *Gibson* (1791) 3 Bro. C. C. 230.

[But not in favour of a husband (*Moodie* v. *Reid* (1816) 1 Madd. 516).]

(g) *Lucena* v. *Lucena* (1842) 5 Beav. 249.
Morse v. *Martin* (1865) 34 Beav. 500.

[There is, however, some doubt whether a defective exercise in favour of children will be aided at the expense of others in the same position who are not provided for (*Morse* v. *Martin*, *ubi sup.*). And the Court will not intervene in favour of an illegitimate child (*Bramhall* v. *Hall* (1764) 2 Ed. 219).]

(h) *A.-G.* v. *Burdet* (1717) 2 Vern. 755.
Piggot v. *Penrice* (1717) Gilb. Eq. Ca. 137.
Innes v. *Sayer* (1848) 7 Ha. 384.

Frauds on powers

1466. Any exercise of a special power of appointment with an object inconsistent with the intention of the settlor, will, though formally correct, be set aside *in toto* by the Court as a 'fraud on the power';[a] but the rights of purchasers of the legal estate for value *bonâ fide* acquired under the exercise will not be affected.[b] In other respects, it is immaterial that the appointee was not aware of the fraudulent character of the appointment.[c]

(a) *Hinchinbrooke* v. *Seymour* (1784) 1 Bro. C. C. 395.
Daubeny v. *Cockburn* (1816) 1 Mer. 626.
D. of Portland v. *Topham* (1864) 11 H. L. C. 32.
Re Kirwan's Trusts (1883) 25 Ch. D. 373.
(b) *McQueen* v. *Farquhar* (1805) 11 Ves., at p. 478, *per* Lord Eldon, C.
Cloutte v. *Storey* [1911] 1 Ch. 18.
(c) *Wellesley* v. *Mornington* (1855) 2 K. & J. 143.
Re Marsden's Trusts (1859) 28 L. J. Ch. 906.

Disclaimer and release of powers

1467. The donee of any power of appointment, whether coupled with an interest or not, may disclaim it,[a] or may by deed release it or contract not to exercise it.[b]

(a) Conveyancing Act, 1882, s. 6.
(b) Conveyancing Act, 1881, s. 52.

[It has been expressly decided, that a married woman, though restrained from anticipation, and though married before 1882, may release by ordinary deed (in conjunction with her husband) a power conferred on her by settlement made before that date (*Re Chisholm* [1901] 2 Ch. 82); and there seems to be no reason why such a person should not disclaim under the Conveyancing Act, 1882. Disclaimer or release of a power may, of course, be a breach of trust, and, therefore, invalid in equity (*Re Eyre* (1883) 49 L. T. 259); but, generally speaking, the rules as to 'frauds on powers' do not apply to releases (*Re Somes* [1896] 1 Ch. 250).]

Survival of powers

1468. Generally speaking, and subject to §1453, *ante*, a power of appointment can only be exercised by the person or persons on whom it is conferred.

Mansell v. *Mansell* (1757) Wilm., at p. 50, *per* Wilmot, L. C.
Brassey v. *Chalmers* (1852) 16 Beav. 223.

But, subject to any contrary expression in the settlement: —

(i) when a power conferred on two or more persons is disclaimed by one of them, the power may be exercised by the other or others, or the survivors or survivor of the others;

Conveyancing Act, 1882, s. 6 (2).

[The Act says 'on' such disclaimer; but, presumably, 'on' means 'after.']

(ii) when, by a settlement coming into operation after 31st December, 1881, a power is conferred on two or more trustees jointly, the power may be exercised by the survivor or survivors of them for the time being;

Trustee Act, 1893, s. 22.

(iii) until the appointment of new trustees under such a settlement, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, may exercise any power conferred on, or ca-

pable of being exercised by, the sole or last surviving or continuing trustee.

Conveyancing Act, 1911, s. 8.

[Apparently, none of the above provisions covers the case of a power conferred upon two or more persons (not being trustees) by name, and the death of one or more of them, without disclaimer. In such a case, the survivors cannot exercise the power (*Montefiore* v. *Brown* (1858) 7 H. L. C. 241). There is, possibly, a distinction where powers are conferred on a class (*Lee* v. *Vincent* (1584) Cro. Eliz. 26), or where the power is annexed to an estate (*Mansell* v. *Mansell* (1757) Wilm., at p. 48, *per Wilmot*, L. C.).]

Repeated exercise

1469. Subject to contrary expressions in the settlement, a power is not exhausted by the exercise thereof, so long as any property remains which the donee might have originally affected by the exercise of such power;[(a)] and the alienation of an estate to which a power is incident will not extinguish the power.[(b)] But the donee of the power cannot, except where he has expressly and lawfully reserved a power of revocation,[(c)] exercise the power in derogation from his own previous conveyance or appointment.[(d)]

(a) *Bovey* v. *Smith* (1682) 1 Vern., at p. 85, *per Curiam*.
Hervey v. *Hervey* (1739) 1 Atk. 561.
(b) *Alexander* v. *Mills* (1870) L. R. 6 Ch. App. 124.

[The rule extends to involuntary alienations, e. g. by the bankruptcy of the donee of the power (*Holdsworth* v. *Goose* (1860) 29 Beav. 111; *Master's Settlement* [1911] 1 Ch. 321).]

(c) *Witham* v. *Bland* (1674) 3 Swanst. 277 n., *per* Lord Nottingham, C.
Saunders v. *Evans* (1861) 8 H. L. C. 721.
(d) *Simpson* v. *Bathurst* (1869) L. R. 5 Ch. App. 193.

Limits of special powers

1470. Where a special power of appointment is created by a settlement, no limitation in exercise of that power which would have been invalid in the settlement, will be valid in the appointment.

Cook v. *Duckenfield* (1743) 1 Atk. 562, *per* Lord Hardwicke, C.
Mosley v. *Mosley* (1800) 5 Ves., at p. 258, *per* Arden, M. R.
Re Norton [1911] 2 Ch. 27.

[Consequently, for example, an appointment which, if it had been made in the settlement, would have violated the Rule against Perpetuities, is void (*Re Norton*, *ubi sup.*) ; though, if the appointment had been an independent instrument, it would not have violated the rule (*post*, Sect. XV, Tit. III). But the doctrine in the § must not be pushed too far, *e. g.* so as to overlook the date of the exercise of the power.]

Illusory appointments

1471. No objection can be taken to the exercise of a special power of appointment, on the ground that one or more of the objects of the power is excluded by such exercise from the benefit thereof; except in so far as the settlor has declared the amount or share from which no object of the power, or some one or more object or objects of the power, shall not be excluded.

Powers of Appointment Act, 1874, ss. 1, 2.

[Before the passing of the Illusory Appointments Act, 1830, special powers of appointment were classified, according to the construction put by the Court on the words of the settlor, as 'exclusive' (i. e. those in which the donee of the power was at liberty to exclude any of the objects of the power from participation in the property) and 'distributive' or 'non-exclusive' (i. e. those in which the donee could only decide the proportions in which the objects should take, without excluding any one entirely). In order

to prevent an evasion of this distinction, the Court held that, in the case of a non-exclusive power, a *substantial* share must, if the power was to be well exercised, be given to each object. This rule was modified by the Act of 1830; but the necessity of appointing *some* share to every object of a non-exclusive power remained till the passing of the Act of 1874, which is retrospective.]

Default of appointment

1472. Where a special power of appointment is accompanied by a gift over of the property in default of appointment, the property vests at once in the person or persons entitled in default of appointment, but subject to devesting in the event of the exercise of the power.[a] And where there is no provision in default of appointment, a gift of either the capital or the income of the property may, where the general intention of the settlor to benefit the objects of the power is clear,[b] be implied (even in a settlement by deed) in favour of the objects of the power. But, in such a case, only those persons can take in default of appointment who might have taken under an exercise of the power.[c]

(a) *Doe* v. *Martin* (1790) 4 T. R. 39.
Lambert v. *Thwaites* (1866) L. R. 2 Eq. 121.

[The consequence is, that the representatives of members of a class, who die before default of appointment, will share in the distribution (*Lambert* v. *Thwaites*, *ubi sup.*).]

(b) *Richardson* v. *Harrison* (1885) 16 Q. B. D. 85.
Re Weekes' Settlement [1897] 1 Ch. 289.
(c) *Kennedy* v. *Kingston* (1821) 2 Jac. & W. 431 } (capital).
Walsh v. *Wallinger* (1830) 2 Russ. & M. 78 }
Re Master's Settlement [1911] 1 Ch. 321.

[In the two earlier cases, some stress was laid on the fact that the power was 'non-exclusive' (*ante*, § 1471, n.). But, *semble*, the rule has not been altered by the passing of the Powers of Appointment Act. (See, however, *Re Weekes' Settlement*, *ubi sup.*, and the language of Romer, J.) The latter part of the rule, where the power is testamentary only, excludes from participating in the property all persons who die in the lifetime of the donee of the power (*Kennedy* v. *Kingston*, *Walsh* v. *Wallinger*, *ubi sup.*)]

Excessive exercise of power

1473. Where an appointment, made in exercise of a power, is partly authorized by such power, and partly unauthorized, either because it includes persons not the objects of the power,[a] or because a condition is annexed to the taking effect of the appointment which is not authorized by the power,[b] or otherwise, then, if the authorized and the unauthorized parts of the appointment are severable,[c] the exercise of the power will be effectual as to the authorized part and ineffectual as to the unauthorized.[d]

(a) In such a case, if the appointor has given, by the same instrument, benefits out of his own property to those objects of the power who benefit by the appointment, such persons will not be allowed to claim both the benefits under the appointment and the benefits out of the appointor's own property, without compensating the persons deprived of their shares in the appointment by reason of the fact that they are not objects of the power ('Election'). But no election is raised unless there is really a fund of the appointor's own, out of which compensation can be made (*Bristow* v. *Warde* (1794) 2 Ves. Jr. 336).

(b) *Alexander* v. *Alexander* (1755) 2 Ves. Sr., at p. 644, *per* Sir Thomas Clarke, M. R.
Stephens v. *Gadsden* (1855) 20 Beav. 463.
Gerrard v. *Butler* (1855) *ibid.* 541.

(c) This is essential. Romilly, M. R., in the case last cited, admits that if 'the superadded terms constitute an essential part of the gift itself,' the whole appointment will be bad. A good deal will depend on whether the persons intended by the appointor to ben-

efit by the failure of the condition, are objects of the power, or not (*Re Perkins* [1893] 1 Ch. 283).

(d) *Alexander* v. *Alexander*, *ubi sup.*
Re Perkins, *ubi sup.*

[*Alexander* v. *Alexander* has been overruled on another point by *Re Kerr's Trusts* (1877) 4 Ch. D. 600. But the doctrine in the text is not affected.]

Powers and perpetuities

1474. Powers of appointment and disposition are subject to the Rule against Perpetuities (*post*, Sect. XV, Tit. III); in the sense that no such power which may, according to the terms of the instrument creating it, be exercised beyond the period of perpetuity, is valid.[a] But if, by the terms of the instrument creating it, the power must be exercised within the period, but may be exercised in favour of objects falling within the period of perpetuity, and also in favour of other objects, an exercise of the power which disposes of the whole or a definite and ascertainable share of the property in favour of objects wholly within the period of perpetuity, will be valid.[b]

(a) *Re Norton* [1911] 2 Ch. 27.
Re De Sommery [1912] 2 Ch. 622.

[It will be remembered that, in the case of a 'special' power, this period commences to run from the taking effect of the settlement, not of the exercise of the power (*ante*, § 1470).]

(b) *Griffith* v. *Pownall* [1843] 13 Sim. 393.
Davies' and Kent's Contract [1910] 2 Ch. 35.
Fane v. *Fane* (1913) 57 Sol. Jo. 321, *per* Cozens-Hardy, M. R.

[An appointment to a class which comprises objects within and without the period is bad (*Lerke* v. *Robinson* (1817) 2 Mer. 363).]

TITLE II—STATUTORY POWERS OF LIMITED OWNERS

Powers of 'tenant for life'

1475. A 'tenant for life,'[a] or a person having or entitled to exercise the powers of a 'tenant for life,'[b] as defined in § 1478, has, with regard to 'settled land,' as defined in § 1476, but subject as explained in this Title, the following powers of disposition and management with regard to such land, viz.: —

(a) Settled Land Act, 1882, s. 2 (5).
(b) For the list of such persons, see ss. 58–62 of the S. L. A., 1882, and *post*, § 1480.

(i) a power to sell or exchange the settled land, or any part thereof, or to sell any chattels (*post*, § 1486) settled therewith, or any easement, right,or privilege of any kind, over or in relation to such land;

Settled Land Act, 1882, s. 3 (i) (iii); s. 37 (1).

(ii) a power to concur in making partition of any land comprised in the settlement, or held in undivided shares thereunder;

Ibid., s. 3 (iv).

(iii) a power to grant leases of the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or

in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding: —

(*a*) in case of a building lease, 99 years;

(*b*) in case of a mining lease, 60 years;

(*c*) in case of any other lease, 21 years;

Settled Land Act, 1882, s. 6.

[Longer terms, or leases in perpetuity, may be authorized by the Court in the case of building or mining leases (*ibid.*, s. 10).]

(iv) a power to accept, with or without consideration, a surrender of any lease of any settled land, in respect of the whole land leased, or any part thereof, with or without exception of any mines or minerals therein, or in respect of any mines or minerals;

Ibid., s. 13.

(v) a power to grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to grant any such lease of the land as above described (§ 1475 (iii));

Ibid., s. 14.

(vi) a power to cut timber growing on the settled land, ripe and fit for cutting;

Ibid., s. 35 (2). (*Quære:* whether, under this section, he may cut timber planted as an improvement, despite the provisions of s. 28 (2)?)

(vii) a power to make, out of capital moneys subject to the settlement, and in manner

prescribed by the Settled Land Acts, improvements, of a kind authorized by statute, on, or in connection with, and for the benefit of, the settled land;

Settled Land Act, 1882, s. 25.

(viii) a power to mortgage the settled land or any part thereof, to raise money for any of the following purposes, viz.: —

(*a*) enfranchisement,[a] including the purchase of the reversion to leaseholds[b] (of any part of the settled land);

(a) *Ibid.*, s. 18.
(b) *Re Bruce* [1905] 2 Ch. 372.

[The words in brackets are not in the Act; but, presumably, are implied.]

(*b*) equality of exchange or partition;

Settled Land Act, 1882, s. 18.

(*c*) payment of any costs, charges, and expenses directed to be paid out of property subject to the settlement;

Ibid., s. 47.

(*a*) discharge of any incumbrance on the settled land or part thereof, other than any annual sum pay-

able only during a life or lives, or during a term of years absolute or determinable.

Settled Land Act, 1890, s. 11.

[Numerous conditions, as to the form and otherwise under which these various powers must be exercised, are imposed by the Settled Land Acts; but are too lengthy to be set out here. It is to be observed, however, that, generally speaking, a purchaser or other person dealing in good faith with the tenant for life, is to be deemed to have given the best price, consideration, or rent, that could reasonably have been obtained by the tenant for life, and to have complied with all the requisitions of the Acts (S. L. A., 1882, s. 54).]

'Settlement'

1476. A 'settlement,' for the purposes of this Title, includes any instrument or instruments, whenever executed or made, whereby any land, or any estate or interest in land (including an undivided share), for the time being stands limited by way of succession; and 'settled land' means any interest in land which is the subject of such an instrument or instruments,[a] including any estate or interest in land which is subject to a trust or direction for sale, and for the application of the proceeds, or the income thereof, or the income of the land until sale, or any part of such proceeds or income, for the benefit of any person for his life or any other limited period, or for the benefit of two or more persons concurrently for any limited period.[b] But, in the case of land subject to a trust or direction for sale, the powers of the tenant for

life may not be exercised without the leave of the Court.[c]

(a) S. L. A., 1882, s. 2.
(b) *Ibid.*, s. 63.
(c) S. L. A., 1884, s. 7.

[The fact that such a trust or power can only be exercised at the request or by the direction of a person other than the donee of the trust or power, is immaterial (*Re Wagstaff's S. E.* [1909] 2 Ch. 201). But an actual power in the tenant for life to forbid the sale is fatal (*Re Goodall's Settlement* [1909] 1 Ch. 440). An order under the Act of 1884 puts an end to the powers of persons not authorized by it to execute the trusts or exercise the powers of the settlement (*ibid.*, s. 7 (iv)); but, until it is registered as a *lis pendens*, it does not affect strangers to the settlement (*ibid.*, s. 7 (vi)). Any estate or interest in remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the settlor's heir, is for the purposes of the Act an estate or interest in the settled land (S. L. A., 1882, s. 2). 'Succession' in the section clearly includes defeazance (see s. 58 (1) (ii)); and the word has no technical force (*Mundy's and Roper's Contract* [1899] 1Ch., at p. 290, *per* Chitty, L. J.).]

'Compound settlement'

1477. Any series of instruments dealing with the same land,[a] and any group of instruments limiting different lands on the same (or substantially the same) limitations,[b] will be deemed a settlement for the purposes of the Settled Land Acts; and the 'tenant for life' thereunder will be able to bind all interests arising by way of succession under such series of instruments, and all land comprised in such group of instruments.

(a) *Mundy's and Roper's Contract* [1899] 1 Ch. 275 (since frequently followed).
Re Phillimore [1904] 2 Ch. 460.

(b) *Re Monson's S. E.* [1898] 1 Ch. 427.
Re Freme [1894] 1 Ch. 1.

[The definition of a 'compound settlement' is far from easy; but the importance of the question is great. Amongst other points, it may affect (i) the power of a tenant for life, as vendor, to give a title against persons having charges under an older deed (*Mundy's and Roper's Contract*, *ubi sup.*), (ii) the power to redeem a mortgage on Whiteacre out of money provided by the sale of Blackacre (*Re Monson*, *ubi sup.*), (iii) the question whether a house is a 'principal mansion house' (*Gilbey* v. *Rush* [1906] 1 Ch., at p. 20, *per* Kekewich, J.), and (iv) the identity of the trustees (S. L. A., 1890, s. 16 (i)). On the other hand, there can be no doubt that several 'settlements' may be contained in a single instrument, *e. g.* a testament.]

'Tenant for life'

1478. A 'tenant for life,' for the purposes of this Title, means any person who is, for the time being, under a settlement as defined in §§ 1476 and 1477, beneficially entitled to the possession [a] or income of settled land,[b] or any two or more persons who are jointly or concurrently so entitled; [c] whether he or they has or have assigned his or their interests or not,[d] and whether the income is subject to charges or incumbrances,[e] or a trust for accumulation,[f] or not.

(a) S. L. A., 1882, s. 2 (5).
(b) *Ibid.*, s. 2 (10) (i).
Re Bennet [1903] 2 Ch. 136.
(c) S. L. A., 1882, s. 2 (6).
(d) *Ibid.*, s. 50 (1). (A 'tenant for life' who has assigned his interest for value cannot, without the assignee's consent, affect the latter's rights. But, unless the assignee is actually in possession of part of the settled land, the tenant for life may exercise his statutory powers of leasing without the assignee's consent (*ibid.*, s. 50 (3)); and an assignment or charge of or

on the 'tenant for life's' interest in consideration of marriage is not an assignment for value for this purpose (S. L. A., 1890, s. 4).

(e) S. L. A., 1882, s. 2 (7).
Re Pollock [1906] 1 Ch. 146.

(f) *Re Llewellyn* [1911] 1 Ch. 451.

[It is clear that a 'tenant for life' includes persons having only equitable interests. But neither the object of a merely discretionary trust (*Re Atkinson* (1886) 31 Ch. D. 577), nor a person taking in a fiduciary capacity (*Jemmett's and Guest's Contract* [1907] 1 Ch. 629), nor a person the commencement of whose interest is actually postponed until the expiry of a trust for accumulation (*Re Strangways* (1885) 34 Ch. D. 423), is a 'tenant for life.']

Infant

1479. An infant who is in his own right seised of or entitled in possession to land is, for the purposes of this Title, deemed to be a tenant for life, and the land settled land.

S. L. A., 1882, s. 59.

[Another example of a fictitious 'settlement' occurs in the case of a tenant by the curtesy, who, though not 'deemed' to be a tenant for life, has the powers of one (s. 58 (viii)). Such a person's estate is deemed to arise under a settlement made by his wife (S. L. A., 1884, s. 8). For the exercise of the powers of an infant 'tenant for life,' see *post*, Sect. VII, Tit. I, § 1504. S. 59 of the Act of 1882 does not apply where the infant is only entitled to the land on the happening of a contingency (*Re Horne* (1888) 39 Ch. D. 84). But it seems that, under the very similar wording of s. 41 of the Conveyancing Act, 1881, where an infant is contingently entitled, the land will be a 'settled estate' for the purposes of the Settled Estates Act, 1877 (*Re Sparrow* [1892] 1 Ch. 412).]

Persons having

1480. The following persons have, when the estate or interest of each of them is in possession,

the powers of a tenant for life as defined in this Title, viz.: — *powers of 'tenant for life'*

(i) a tenant in tail (in every case except where he is restrained from barring or defeating the estate tail by Act of Parliament, and the land was purchased with moneys provided by Parliament in consideration of public services);

(ii) a tenant in fee simple, with an executory limitation over (*ante*, Sect. I, Tit. VIII, § 1183);

(iii) a person entitled to a base fee (*ante*, Sect. I, Tit. III, § 1058);

(iv) a tenant *pur autre vie* (*ante*, Sect. I, Tit. IV, §§ 1070, 1801–5) and a tenant for years determinable on life, not holding 'merely' under a lease at a rent;

[The interpretation of the latter part of this clause is not easy. But the restriction is clearly important.]

(v) a tenant for his own life, or a tenant such as is described in (iv), whose estate is liable to cease in any event during the life of the *cestui que vie*, or is subject to a trust for accumulation;

[In this subs. there is no restriction such as that applying to (iv).]

(vi) a tenant in tail after possibility of issue extinct (*ante*, Sect. I, Tit. III, § 1056).

(vii) a tenant by the curtesy;

[For the 'tenant by the curtesy,' see *post*, Bk. V (Succession).]

(viii) a person entitled to the income of land under a trust liable to be determined on sale or bankruptcy or any other event;

S. L. A., 1882, s. 58 (1); s. 63 (1).

(ix) A married woman entitled for her separate use, whether restrained from anticipation or not, to any interest which, had she been a *feme sole*, would have constituted her a tenant for life, or given her the powers of a tenant for life.

Ibid., s. 61 (2) (6).

[Where she is entitled, but not for her separate use, she and her husband together have the powers of a tenant for life (*ibid.*, s. 61 (3)). For the powers of a dowress, see *post*, § 1495.]

Statutory powers inalienable

1481. A tenant for life under this Title cannot assign or release his statutory powers, or contract not to exercise them; nor do they pass with an assignment, by operation of law or otherwise, of the tenant for life's interest in the land.

Ibid., s. 50.

Cannot be excluded

1482. The settlor cannot, directly or indirectly, limit or prohibit the exercise of the statutory powers of the tenant for life by any provision in the settlement; but additional or larger powers may be

conferred by the settlement, so far as they are not inconsistent with the statutory powers.

S. L. A., 1882, ss. 51, 56, 57.

[It is expressly provided in the Act (s. 52) that no exercise of the tenant for life's powers shall occasion a forfeiture; and the cases show that any attempt, however indirect, to penalize a tenant for life for exercising his statutory powers, or to induce him to abstain from exercising them, will be held void.]

Fiduciary

1483. In exercising his statutory powers, the tenant for life must have regard to the interests of all parties entitled under the settlement; and he is, in relation to such exercise, deemed to be in the position, and to have the duties and liabilities, of a trustee for such parties.

Ibid., s. 53.

[It is by reason of this provision that a tenant for life is unable to delegate the exercise of his statutory powers (*Re Wilton's S. E.* [1907] 1 Ch., at p. 55, *per* Warrington, J.).]

Lunatic tenant for life

1484. Where a tenant for life, or a person having the powers of a tenant for life, is a lunatic so found by inquisition, the committee of his estate may, under an order of the Lord Chancellor or other person having jurisdiction in lunacy, exercise his statutory powers as a tenant for life.

Ibid., s. 62.

[Notwithstanding some doubts, it seems probable that neither the statutory powers (*Re S. S. B.* [1906] 1 Ch. 712), nor the stat-

utory consents (*De Moleyns' and Harris' Contract* [1908] 1 Ch. 110) can be exercised or given by the 'quasi-committee' of a lunatic not so found, or of a person who through infirmity of mind arising from age is incapable of managing his affairs (Lunacy Act, 1890, s. 116); even with the approval of the Court.]

Consent to exercise

1485. The statutory powers of a tenant for life may not be exercised without the consent of the trustees of the settlement or the Court in the following cases, viz.: —

(*a*) in the cutting of timber (*ante*, § 1475 (vi));

S. L. A., 1882, s. 35 (1).

(*b*) in selling, exchanging, or leasing the 'principal mansion house' and the pleasure grounds and park and lands (if any) usually occupied therewith;

S. L. A., 1890, s. 10 (2).

[What is a 'principal mansion house' may be a question of difficulty (*Gilbey* v. *Rush* [1906] 1 Ch. 11); but the Act provides (s. 10 (3)) that a house which is usually occupied as a farm house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a 'principal mansion house' within the meaning of the section.]

(*c*) in making improvements out of capital money arising under the Settled Land Acts (*post*, § 1494).

S. L. A., 1882, s. 26 (1).

'Heirlooms'

1486. A tenant for life can, under his statutory powers, sell personal chattels settled on trust so as to

devolve with the settled land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to a freehold of inheritance in the land. But such sale cannot be made without an order of the Court.

S. L. A., 1882, s. 37 (3).

Dealings with tenant for life

1487. Where the tenant for life wishes to acquire by purchase, exchange, or partition, any part of the settled land, or where it is proposed to purchase from the tenant for life any land to be included in the trusts of the settlement, the statutory powers of the tenant for life are exercised by the trustees of the settlement.

S. L. A., 1890, s. 12.

Power to contract

1488. A tenant for life may enter into a binding contract to do any of the acts which he has statutory power to do, and vary or rescind the same. Such contract will (unless varied or rescinded) enure for the benefit of the settled land, and be enforceable against and by every successor in title for the time being of the tenant for life; and every such successor may rescind or vary the same as the tenant for life might have done,[a] or may, for the purpose of carrying into effect such contract, grant any lease[b] or make any

conveyance [c] which, if made by such predecessor, would have been binding on his successors in title.

(a) S. L. A., 1882, s. 31.
(b) *Ibid.*, s. 12 (i).
(c) S. L. A., 1890, s. 6.

Validation of voidable leases

1489. Where, in the intended exercise of any statutory or other lawful power, a lease has been *bonâ fide* granted not in conformity with such power, and the lessee has entered thereunder, such lease will be deemed in equity a contract to grant, at the request of the lessee, his representatives or assigns, a valid lease under such power; and all persons who would have been bound by a valid lease under such power, are bound by such contract, unless they are willing to confirm without variation the lease actually granted. If the estate of the person granting such lease continues until after the time when he could have lawfully granted it, such lease will take effect as if it had been granted at such time.

Leases Act, 1849, ss. 2, 4.

[A simple memorandum, on or before acceptance of rent, by a person entitled to treat the lease as invalid, confirming the lease, will have the effect of a confirmation by such person; and where a reversioner becomes able to confirm an invalid lease, the lessee cannot refuse to accept confirmation (Leases Act, 1850, ss. 2, 3). The Leases Act, 1849, is not confined to 'tenants for life'; but it does not apply to ecclesiastical corporations, colleges, hospitals, or charitable foundations (s. 7).]

1490. A tenant for life, intending to exercise any of his statutory powers, must give one month's notice by registered letter to the trustees of the settlement and their solicitor (if known to the tenant for life). *Notice of intention to exercise powers*

S. L. A., 1882, s. 45.

But: —

(i) such notice, as regards a sale, exchange, partition, or lease, may be of a general intention;

S. L. A., 1884, s. 5 (1).

(ii) it is not required in the case of intention to grant a lease for a term not exceeding twenty-one years at the best rent that can reasonably be obtained without fine;

S. L. A., 1890, s. 7 (1).

(iii) any trustee may, by writing under his hand, waive notice, or may accept less than one month's notice;

S. L. A., 1884, s. 5 (3).

(iv) a person dealing in good faith with the tenant for life is not concerned to see that such notice has been given.

S. L. A., 1882, s. 45 (3).

1491. For the purposes of the Settled Land Acts, the following persons, in the order named, are deemed alternatively to be trustees of the settlement, viz.: — *Trustees for purposes of the Acts*

(i) the persons who, under the settlement, are trustees with a general power of sale, or to consent to a sale, or to approve of the exercise of a power of sale of (the) settled land;

S. L. A., 1882, s. 2 (8).

(ii) the persons declared by the settlement to be trustees for the purposes of the Acts;

Ibid.

(iii) the persons (if any) for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale;

S. L. A., 1890, s. 16 (i).

(iv) the persons (if any) for the time being under the settlement similarly empowered or entrusted with regard to a future power or trust for sale, whether the power or trust takes effect in all events, or not;

Ibid., s. 16 (ii).

(v) the persons appointed by the Court for the purpose.

S. L. A., 1882, s. 38.

[The provisions of the Trustee Act, 1893, as to the appointment of new trustees (see especially ss. 10–12 of that Act) apply to trustees for the purposes of the S. L. Acts (Trustee Act, 1893,

s. 47). Ordinarily, the tenant for life cannot exercise his statutory powers unless there are at least two trustees (S. L. A., 1882, s. 45 (2)); but this rule does not apply to the granting of the leases specified in § 1490 (ii) (S. L. A., 1890, s. 7 (ii)).]

Capital moneys

1492. All capital moneys arising under the Settled Land Acts must be paid to the trustees of the settlement or into Court, at the option of the tenant for life, and be invested or applied by and in the names or under the control of the trustees, in compliance with the provisions of the Acts, according to the direction of the tenant for life, or, in default, according to the discretion of the trustees.

S. L. A., 1882, s. 22.

[Such moneys and investments are regarded as land subject to the dispositions of the settlement (*ibid.*, s. 22 (5).]

Investment of capital moneys

1493. Capital moneys arising under the Settled Land Acts are applicable: —

(i) in making investments specified in the Trustee Act, 1893, ss. 1–7;

S. L. A., 1882, s. 21 (i).

[The provisions of the Trustee Act are a good deal wider than those of the S. L. Act in this respect. But, presumably, they supersede the latter.]

(ii) in discharge of incumbrances on the inheritance or other the whole estate subject to the settlement;

Ibid., s. 21 (ii).

(iii) in payment for authorized improvements (*post*, § 1494);

S. L. A., 1882, s. 21 (iii).

(iv) in payment for equality of exchange or partition of the settled land;

Ibid., s. 21 (iv).

(v) in purchase of the seignory of any freehold land, or the fee simple of any copyhold or customary land, being part of the settled land;

Ibid., 21 (v).

(vi) in purchase of the reversion or freehold in fee of any part of the settled land which is held on lease for life or years;

Ibid., s. 21 (vi).

(vii) in purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the date of the purchase;

Ibid., s. 21 (vii).

but:—

(*a*) capital money arising from settled land in England may not (unless the settlement so expressly authorizes) be applied in the purchase of land out of England; and

Ibid., s. 23.

(*b*) moneys arising under a settlement by way of trust for sale, may not

be invested in the purchase of land, unless the settlement authorizes such investment.

S. L. A., 1882, s. 63 (2) (ii).

(viii) in purchase in fee simple, or for a period of sixty years or more, of mines or minerals convenient to be held or worked, or of any easement, right, or privilege convenient to be held, with the settled land;

Ibid., s. 21 (viii).

(ix) in payment to any person becoming absolutely entitled, or empowered to give an absolute discharge;

Ibid., s. 21 (ix).

(x) in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Settled Land Acts.

Ibid., s. 21 (x).

Scheme of improvements

1494. A tenant for life desirous of making any of the improvements authorized by statute to be made out of capital moneys arising under the Settled Land Acts,[a] may submit a scheme for the approval of the trustees or the Court; and, after an approved scheme has been carried out, the trustees or the Court may,

on a certificate of the Board of Agriculture, or of a competent engineer or able practical surveyor approved by the Board or the Court, apply or direct to be applied the whole or any part of such capital moneys in or towards payment therefor.[b]

(a) For a list of these, see S. L. A., 1882, s. 25; S. L. A., 1890, s. 13.
(b) S. L. A., 1882, s. 26.

[The tenant for life and any of his successors may be required by the Board to repair and insure the improvements made out of capital moneys, and to report to the Board on the state thereof; and they may not cut down timber planted as an improvement (*ibid.*, s. 28 (i)–(iii)). On the other hand, the tenant for life and his successors, though limited owners, may with impunity commit many kinds of waste in executing or repairing improvements authorized by the Acts (*ibid.*, s. 29). The Court has now power to authorize the expenditure of capital moneys on improvements made by the tenant for life; even though the latter has not previously submitted a scheme (S. L. A., 1890, s. 15). Later statutes, e. g. the Housing of the Working Classes Act, 1890, s. 74 (1) (b), and the Agricultural Holdings Act, 1908, s. 20, add to the list of improvements which may be made under the Settled Land Acts.]

Leases by dowress

1495. A dowress, or a husband entitled to the profits of land of which his wife is seised in fee, may make leases of the land (except the principal mansion house and demesne) for any term not exceeding twenty-one years, to take effect within one year from the making thereof.

Settled Estates Act, 1877, s. 46.

[These persons are not 'tenants for life' within the terms of s. 2 (5) of the S. L. A., 1882; because they do not take 'under a settlement.' And, as they are not expressly given the powers of a

tenant for life by s. 58, presumably they can only rely on the Settled Estates Act, 1877. Husbands entitled *jure mariti* must now be rare; for they must not only have been married before 1883, but their wives must have acquired the land before that date. The leases authorized by s. 46 of the Settled Estates Act, 1877, are subject to various conditions.]

Leases by tenant in tail

1496. A tenant in tail (in possession) may by ordinary deed grant a lease of any part of the entailed land for a period not exceeding twenty-one years, to commence at any time not exceeding twelve months from the date of the lease, at a rent not less than five sixths of a rackrent; and such lease will be binding both on the issue in tail and on the reversioner or remainderman (including the Crown).

Fines and Recoveries Act, 1833, ss. 15, 41.

NOTE

Under the powers conferred by numerous statutes, e. g. the Public Money Drainage Acts, 1846-1856, and the Improvement of Land Acts, 1864 and 1899, public and private moneys can be advanced for the purpose of making various classes of improvements of land, and can be charged upon the inheritance by way of terminable rent charge. Proceedings under these Acts are usually initiated by limited owners; but the details are too lengthy to be set out here. It may be mentioned, however, that, by s. 30 of the S. L. A., 1882, all the improvements which, by that Act (and, presumably, by the S. L. A., 1890) are authorized to be made out of capital moneys in the hands of the trustees or the Court, may be made under the alternative machinery of the Improvement of Land Acts.

SECTION VII

INCAPACITY TO HOLD AND ALIENATE LAND

TITLE I — MINORS

Acquisition and alienation

1497. A minor can acquire and alienate land; but, subject to § 1500, *post*, conveyances of land by and to a minor (other than conveyances by virtue of special custom)[a] are voidable by the minor,[b] within a reasonable time after he attains his majority, or by his representatives[c] within a reasonable time after his decease.[d]

(a) The most important of these is the custom by which a minor can convey gavelkind land by feoffment at the age of fifteen (*Maskell's and Goldfinch's Contract* [1895] 2 Ch. 525), a custom obviously referred to in the Real Property Act, 1845, s. 3.

(b) Litt. s. 259.
Co. Litt. 2 b.
Ketsey's Case (1613) Cro. Jac. 320.
Blunden v. *Baugh* (1632) Cro. Car., at p. 306, *per* Richardson, C. J.
Smith v. *Low* (1739) 1 Atk. 489.
Zouch v. *Parsons* (1765) 3 Burr. 1794.

(c) *Whittingham's Case* (1603) 8 Rep. 42 b. (Mere privies in estate have no such right (*ibid.*).)

(d) *Doe* v. *Smith* (1788) 2 T. R. 436.
Edwards v. *Carter* [1893] A. C. 360. (This was a covenant rather than a conveyance; but on the question of 'reasonable time' the remarks of the House are general.)

Powers of appointment

1498. A minor cannot (except under § 1500) exercise a power appendant, or (*semble*) a power in

gross, over land[a] (*ante*, Sect. VI, Tit. I, § 1463); but a power collateral over land may be irrevocably exercised *inter vivos* by a minor, if it is the apparent intention of the settlor to enable him to do so.[b]

(a) *Hearle* v. *Greenbank* (1749) 3 Atk. 695. (There seems to be no actual authority for powers in gross. But see Sugden, *Powers* (8th ed.) p. 177; Farwell, *Powers* (2nd ed.) p. 125.)

(b) *King* v. *Bellord* (1863) 1 H. & M., at p. 347, *per* Wood, V. C., approved in
Re Cardross' Settlement (1878) 7 Ch. D. 728.
Re D'Angibau (1880) 15 Ch. D. 228.

[Of course, a minor cannot exercise any power by testament (Wills Act, 1837, s. 7). For the exercise of the statutory powers of a minor under the Settled Land Acts, see *post*, § 1504.]

Presentation to living

1499. A minor can present to a living of which the advowson is vested in him at law or in equity.

Arthington v. *Coverly* (1733) 2 Eq. Ca. Ab. 518.
Hearle v. *Greenbank*, *ubi sup.*, at p. 710, *per* Lord Hardwicke, C.

Marriage settlement

1500. A male minor of the age of twenty years and a female minor of the age of seventeen years[a] may, with the sanction of the Court, upon or in contemplation of his or her marriage,[b] make a valid settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment.[c]

(a) There is some difference of opinion as to whether the statute applies to settlements made after these ages by minors married before (*Re Phillips* (1887) 34 Ch. D. 467; *Re Leigh* (1888) 40 Ch. D., at p. 297, *per* Cotton, L. J.).

(b) The Act has been held to apply to post-nuptial settlements (*Re Sampson and Wall* (1884) 25 Ch. D. 482).
(c) Infants Settlement Act, 1855, ss. 1, 4.

But: —

(i) a minor cannot, by virtue of the above provision, exercise a power of which it is expressly declared that it is not to be exercised by a minor;

Ibid., s. 1, *ad fin.*

(ii) where any power of appointment has been exercised, or any disentailing assurance executed, by a minor tenant in tail, by virtue of the above provision, and such minor dies before attaining majority, such appointment or disentailing assurance thereupon becomes absolutely void.

Ibid., s. 2.

Grant of office

1501. A grant of an office to an infant, in possession or reversion, is valid; if the infant has sufficient knowledge to execute it when it falls into possession, or if the office is exerciseable by deputy.

Young v. *Fowler* (1639) Cro. Car. 555.

Breach of condition

1502. A breach of a condition subsequent by a minor occasions a forfeiture of his estate (*ante*, Sect. III, Tit. I, §§ 1360, 1361); subject to any power of

relief vested in the Court (*ante*, Sect. III, Tit. I, §§ 1368–1374).

Co. Litt. 246 b, 380 b.
Whittingham's Case (1603) 8 Rep. 42 b.
Slade v. *Tompson* (1615) 3 Bulstr. 58 (but held no breach).
Young v. *Fowler* (1639) Cro. Car. 556, *per Curiam*.
Partridge v. *Partridge* [1894] 1 Ch. 351.

[In *Re Edwards* [1910] 1 Ch., at p. 550, Warrington, J., seems to suggest that Coke is referring to conditions precedent only. *Sed quære*.]

Manorial powers

1503. A minor, being lord of a manor, may validly make any grant or accept any surrender of a copyhold tenement according to the custom of the manor, and do any other ministerial act as lord of such manor in accordance with such custom.

Clark v. *Pennifather* (1584) 4 Rep., at 23 b.
Swayne's Case (1608) 8 Rep., at 63 b.
Hearle v. *Greenbank* (1749) 3 Atk., at p. 701, *per* Lord Hardwicke, C.

[It was held, though with some difference of opinion, in *Shoplane* v. *Roydler* (1605) Cro. Jac. 98, that the grant of the infant's guardian in socage was also good. It was also said by Vaughan, C. J., in *Bedell* v. *Constable* (1669) Vaugh., at p. 182, that a guardian in socage (and, therefore, now a statutory guardian under the Acts of 1660 and 1886) could grant leases of his ward's land to endure during the ward's minority.]

Statutory powers

1504. Where, by reason of the fact that an infant is seised of or entitled in possession to land, such land is settled land (*ante*, Sect. VI, Tit. II, § 1479) for the purposes of the Settled Land Acts, the trustees of the

settlement will be entitled to exercise the powers of a tenant for life under the Acts.[a] And where, by reason of an infant being absolutely or contingently entitled to a fee simple or leasehold estate, such estate is a settled estate for the purposes of the Settled Estates Act, 1877, the trustees of the settlement may exercise the powers conferred on trustees by the latter Act.[b]

(a) Settled Land Act, 1882, s. 60.
(b) Conveyancing Act, 1881, s. 41.

Management of infant's land

1505. Where a person beneficially entitled to the possession of land is an infant, the trustees appointed for the purpose by the settlement, or, if none, the persons under the settlement for the time being trustees with power of sale of the settled land, or of part thereof, or with power to consent to or approve the exercise of such a power of sale, or, if none, any persons appointed as trustees for the purpose by the Court, on the application of a guardian or next friend of the infant, may, subject to the terms of the instrument (if any) under which the interest of the infant arises, enter into and continue in possession of the land; and in every such case the following rules apply: —

(i) the trustees must manage or superintend the management of the land, with full power to cut timber and underwood in

the usual course, to erect, repair, and pull down buildings, continue the working of mines and quarries, drain and otherwise improve the land, insure against loss by fire, make arrangements with tenants and others, and accept surrenders of tenancies, but, where the infant is impeachable for waste, without power to commit waste;

(ii) the trustees, out of the income of the land, may pay expenses of management, and all outgoings not payable by any other person, and must keep down any annual sum, and the interest of any principal sum, charged on the land. But, where the infant's interest arises under an instrument, this § only applies if that instrument come into operation after the year 1881.

Conveyancing Act, 1881, s. 42 (1) (2) (3) (7) (8).
Conveyancing Act, 1911, s. 14.

[The provisions of s. 42 of the Act of 1881 are applicable when the infant is only entitled to an undivided share (*ibid.* (6)), and also when the infant does not take by settlement, e. g. when he takes by inheritance.]

Acquisition and alienation

1506. A married woman can acquire land in the same manner as a man or a *feme sole*.[a] If married after 31st December, 1882, as regards all her interests in land,[b] and, if married on or before that day, as regards all her interests since acquired, she can (subject to any restraint on anticipation (*ante*, Bk. I, § 105)) dispose of them in the same manner as a *feme sole*.[c] If married on or before that day, she can only (subject to § 1508) dispose of or disclaim, by deed acknowledged, with the concurrence of her husband, under the Fines and Recoveries Act, 1833, interests in land (other than copyholds) acquired, otherwise than to her separate use, on or before that day.[d]

(a) Married Women's Property Act, 1882, s. 1 (1).

['Acquisition' includes any form of title, whether vested or contingent, and whether in possession, reversion, or remainder (M. W. P. Act, 1882, s. 5). Apparently, copyholds, when there was a custom to that effect, could, even before 1833, be surrendered by a married woman without the formality of a fine or recovery. But in *Johnson v. Clark* [1908] 1 Ch. 303, it was held, by Parker, J., that an alleged burgage custom for a wife to convey without separate examination was (apart from the Act of 1882) void, as 'unreasonable.'

(b) Married Women's Property Act, 1882, ss. 1, 2; 1893, s. 3.
(c) Married Women's Property Act, 1882, s. 5.
(d) Fines and Recoveries Act, 1833, s. 77.
Real Property Act, 1845, s. 7.
Conveyancing Act, 1881, s. 65 (2) (i).

[It seems that, at the common law, a married woman had no power to disclaim an estate conveyed to her (*ante*, § 1393). By the Real Property Act, 1845, s. 7, she was empowered to disclaim; but only by deed acknowleged, with her husband's consent. Ought not, therefore, such a woman to be entitled to disclaim within a reasonable time after her husband's death? The question may possibly arise with regard to women married before 1883.]

Conveyances between husband and wife

1507. 'Freehold land' may be conveyed by a husband to his wife, and by a wife to her husband, alone, or jointly with another person, by the like means by which it might be conveyed by him or her to another person.

Conveyancing Act, 1881, s. 50 (1).

[It will be observed, that this section of the Conveyancing Act does not include a wife's leaseholds, which, during the marriage, could, at common law, be alienated only by the husband. But, since 1882, the power of a wife to convey and acquire leaseholds to and from her husband cannot be doubted; and it seems equally clear, that a husband may surrender copyholds to the use of his wife, and *vice versâ* (*Driver* v. *Thompson* (1812) 4 Taunt. 294). But a husband, lord of a manor, could not, before the Married Women's Property Act, make a grant of a copyhold to his wife (*ante*, Sect. I, Tit. V, § 1090).]

Powers of appointment

1508. Even in cases to which the Married Women's Property Acts do not apply, a married woman may exercise, without the concurrence of her husband, any power of appointment, whether coupled with an interest or not;[a] unless the settlor has expressly or by implication prohibited such exercise.[b] And a married woman may release[c] or dis-

claim any power;[d] except in such a way as to remove a restraint on anticipation.

(a) *Peacock* v. *Monk* (1751) 2 Ves. Sen., at p. 191, *per* Lord Hardwicke, C.
Doe v. *Eyre* (1848) 5 C. B. 713.
Wood v. *Wood* (1870) L. R. 10 Eq. 220.
(b) *Morris* v. *Howes* (1845) 4 Ha. 599 (as to the second coverture).
(c) Conveyancing Act, 1881, s. 52 (1).
Re Chisholm [1901] 2 Ch. 82.
(d) Conveyancing Act, 1882, s. 6 (1).

Election

1509. A married woman may, without the concurrence of her husband, and whether the Married Women's Property Acts apply, or not, elect between two alternative benefits, so as to bind her land;[a] but not so as to release herself from a restraint on anticipation.[b]

(a) *Ardesoife* v. *Bennett* (1772) 2 Dick. 463.
Barrow v. *Barrow* (1858) 4 K. & J. 409.
(b) *Re Vardon's Trusts* (1885) 31 Ch. D. 275.
Haynes v. *Foster* [1901] 1 Ch. 361.

[The result of the latter restriction sometimes is, that the married woman gets both benefits.]

Trust property

1510. A married woman may dispose, or join in disposing, in the same manner as a *feme sole*, and without the concurrence of her husband, of any property which she holds, solely or jointly, as trustee or personal representative.

Married Women's Property Act, 1907, s. 1.

[This provision operates retrospectively to the beginning of 1883, except as to rights acquired between 1882 and 1908 (*ibid.*, s. 1 (2).]

Estates tail and 'long terms'

1511. A married woman, being, either alone or jointly with her husband, protector of a settlement (*ante*, Sect. I, Tit. III, § 1059), may give her consent to the disposition of a tenant in tail, in the same manner as if she were a *feme sole*;[a] except that, if she is protector by virtue of an estate which is not her separate property, her consent is not effectual unless her husband joins.[b] A married woman, being a tenant in tail, may bar the entail,[c] and, being entitled to a 'long term' (*ante*, Sect. I, Tit. VI, § 1155) may enlarge the same;[d] notwithstanding that, in either case, she is restrained from anticipation in respect thereof.[e]

(a) Fines and Recoveries Act, 1833, s. 45.
Married Women's Property Act, 1907, s. 3.

[The last-mentioned enactment is retrospective to 1882.]

(b) Fines and Recoveries Act, 1833, s. 24.

[For the mode of consent, see *ante*, § 1064.]

(c) *Cooper* v. *Macdonald* (1877) 7 Ch. D. 288.
(d) Conveyancing Act, 1881, s. 65 (2) (i).
(e) Naturally, she must not do so in a way that alienates the fee simple away from herself.

[Whether the married woman can bar the entail or enlarge the term without her husband's consent, or deed acknowledged, depends, of course, on the provisions of § 1506.]

Copyholds

1512. For the purposes of the Copyhold Act, 1894, a married woman, being lady or tenant of a manor, is deemed to be a *feme sole*.

Copyhold Act, 1894, s. 46.

[For the exercise of statutory powers of married women, being limited owners, see *ante*, Sect. VI, Tit. II, § 1480 (ix). For the purposes of the Agricultural Holdings Act, 1908, if the land is not the separate property of the wife, she must, before acting, be examined apart from her husband by the County Court, or by the Judge of the County Court, for the place where she is, with a view to seeing that she understands the nature and effect of her intended act, and is acting freely and voluntarily (A. H. A., 1908, s. 33).]

1513. A corporation sole or aggregate may acquire land;[a] but cannot hold it except under a license from the Crown,[b] or under the provisions of an Act of Parliament.[c] Any assurance of tenements or hereditaments of whatsoever tenure[d] to a corporation other than under such license or Act of Parliament, is an unlawful assurance, and works a forfeiture of the land assured, as from the date of such assurance.[e] *Mortmain*

(a) Co. Litt. 94 b. (In fact, an ecclesiastical corporation was the only person which could acquire lands in frankalmoign (Litt. s. 133)).

(b) Formerly the licenses of all the mesne lords were necessary, as well as that of the Crown. But the necessity for the licenses of the mesne lords was abolished by the 7 & 8 Will. III (1695), c. 37.

(c) These provisions are too numerous to be set out here. They will be found indexed in the current *Chronological Table and Index of Statutes, sub tit.* 'Mortmain (Exemptions).'

(d) Mortmain and Charitable Uses Act, 1888, s. 10 (iii) (as amended by the Act of 1891, s. 3, which excludes money secured on land, and other personal estate arising from or connected with land, from the operation of the rule of Mortmain).

(e) *Ibid.*, ss. 1, 2.

[It should be carefully remembered, that the so-called Mortmain and Charitable Uses Act, 1891, in no way (except, possibly, as to money charged on or arising out of land) affected the law with regard to assurances in mortmain.]

1514. *Primâ facie*, such forfeiture accrues to the Crown; but the immediate mesne lord may, within twelve months from the date of the unlawful assur- *Rights of mesne lords*

ance, and any other mesne lord within six months after the right of his next inferior lord expires, enter on and hold the land. If a mesne lord is under any incapacity when his right to enter accrues, such right may be exercised by his guardian or the committee of his estate, or by such other person as the Court may appoint in that behalf.

Mortmain and Charitable Uses Act, 1888, s. 1.

Saving for rents

1515. No forfeiture to the Crown under § 1514 affects any rent or service due in respect of the land to the Crown or any other lord thereof.

Ibid., s. 3.

Corporation as joint tenant

1516. Subject to § 1513, a corporation may acquire and hold land in joint tenancy with one or more other corporations or individuals; and on the dissolution of the corporation its interest will devolve on the other joint tenant (or tenants).

Bodies Corporate (Joint Tenancy) Act, 1899, s. 1.

Alienation by corporation

1517. Subject to the provisions of any Act of Parliament, and of its charter or other document of incorporation, a corporation aggregate may alienate

land by conveyance *inter vivos* under its common seal, in the same way as an individual.

Co. Litt. 325 b.
Holland v. *Boins* (1586) 2 Leon. 121.
Case of Sutton's Hospital (1612) 10 Rep., at 30 b.
Smith v. *Barrett* (1663) 1 Sid. 162, *per Curiam.*
The Bankers' Case (1695) Skinner, at p. 602, *per* Holt, C. J.
Mayor, &c. of Colchester v. *Lowten* (1813) 1 V. & B., at p. 244, *per* Lord Eldon, C.

[In the case of public corporations, the consent of some public authority, e. g. the Ecclesiastical Commissioners (for ecclesiastical corporations) or the Local Government Board (for municipal corporations) is almost invariably required; except for the grant of short leases at rack or customary rents. The provisions are so numerous, that it is impossible to set them out here. The position of the corporation sole at common law was probably the same as that of the corporation aggregate; except that the consent of the patron, ordinary, chapter, &c., was required (Co. Litt. 44 a, 325 b). But almost all examples of the corporation sole are public corporations, to whose alienations at the present day the consent of a public authority is usually requisite.]

University and college

1518. A university or college, as defined by the Universities and College Estates Act, 1898, may exercise, with the consent of the Board of Agriculture, any of the powers described in Section VI, Title II, *ante*, for the purposes of sale, enfranchisement, exchange, partition, and leasing on building leases with option of purchase, and, without such consent, any other powers of leasing so described. Capital money payable under any transaction which requires the consent of the Board, must be paid to the Board.

Universities and College Estates Act, 1898, s. 1.

Sales of glebe

1519. Subject to the provisions of the Glebe Lands Act, 1888, the provisions of Section VI, Title II, *ante*, with respect to the sale of land by a tenant for life apply to sales by incumbents under that Act, in like manner as though such incumbent were tenant for life of the land.

Glebe Lands Act, 1888, s. 8 (4).

Assurance of land for charitable purposes

1520. Subject to any savings and exceptions provided by Act of Parliament, an assurance *inter vivos* of land (including tenements or hereditaments, of whatsoever tenure, but not including money secured on land, or other personal estate arising from or connected with land), and an assurance *inter vivos* of personal estate to be laid out in the purchase of land, to or for the benefit of any charitable use, is void, unless it complies with the following requirements, viz.: —

(i) it must take effect in possession for the benefit of the charitable use immediately from the making thereof;

(ii) it must be without power of revocation, reservation, condition, or provision for the benefit of the assuror of any person claiming under him, other than is provided in § 1521;

(iii) it must (unless it is of copyhold or customary land or stock in the public funds) be made by deed executed in the presence of two witnesses;

(iv) it must (unless it is of stock in the public funds, or unless it is made in

good faith for full and valuable consideration) be made at least twelve clear months before the death of the assuror;

(v) it must, if it is of stock in the public funds (unless it is made in good faith for valuable consideration) be transferred in the public books at least six clear months before the death of the assuror;

(vi) it must (unless it is of stock in the public funds) be enrolled within six months after its execution in the Central Office of the Supreme Court.

Mortmain and Charitable Uses Act, 1888, s. 4; 1891, s. 3.

[There are elaborate provisions in s. 5 of the Act of 1888, to remedy an accidental omission of enrolment.]

Valid reservations

1521. The following and similar provisions, if they reserve the same benefits to persons claiming under the assuror as to the assuror himself, are not deemed to be provisions for the benefit of the assuror within the meaning of § 1520 (ii), viz.:—

(i) the grant or reservation of a peppercorn or other nominal rent, or of mines or minerals, or of any easement;

(ii) covenants or provisions as to buildings, streets, drainage, nuisances, and the like, for the use and enjoyment as well of the

land assured as of any adjacent or neighbouring land;

(iii) a right of entry on non-payment of any such rent or on breach of any such covenant or provision.

Mortmain and Charitable Uses Act, 1888, s. 4 (4).

Charitable devises

1522. Any interest in land, or personal estate directed to be laid out in the purchase of land, may be assured to or for the benefit of any charitable use by the testament of a person dying after 4th August, 1891.

Mortmain and Charitable Uses Act, 1891, ss. 5, 7, 9.

But, unless the Court or the Charity Commissioners is or are satisfied that the land assured or directed to be purchased is required for actual occupation for the purposes of the charity, the following rules apply: —

Ibid., s. 8.

(i) The land assured must be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Commissioners.

Ibid., s. 5.

(ii) If it is not so sold, the land vests forthwith in the official trustee of charity lands; and

the Commissioners must take all necessary steps to effect a sale of such land with all reasonable speed.

Mortmain and Charitable Uses Act, 1891, s. 6.

(iii) Personal estate directed to be laid out in the purchase of land will be held to or for the benefit of the charitable uses, as if there had been no such direction.

Ibid., s. 7.

Definition of 'charity'

1523. For the purposes of this Title, a charitable use means a use for the relief of poverty, the advancement of education or religion, or any other purpose deemed to be for the benefit of the community generally; even though restricted to a particular area or class.

Jones v. *Williams* (1766) 2 Ambl. 651, *per* Lord Northington, C.
Income Tax Commrs. v. *Pemsel* [1891] A. C. 531.
Re Foveaux [1895] 2 Ch., at p. 504, *per* Chitty, J.

[The question as to what constitutes a purpose 'charitable,' so as to bring it within the policy of the so-called Mortmain Acts, has always been difficult; but it has been rendered more difficult by recent legislation. In practice, the Courts rely substantially on the recital in the preamble of the 43 Eliz. c. 4; though it is admitted that this recital is not exhaustive. The 43 Eliz. c. 4 was repealed by the Mortmain and Charitable Uses Act, 1888, s. 13 (2); with an obscure reservation which appears only to add to the confusion. The conflicting views of eminent authorities may be seen in the report of *Income Tax Commissioners* v. *Pemsel*, *ubi sup.*]

Conveyances of non compos

1524. The conveyances by deed of an idiot [a] or a lunatic so found [b] are void; the conveyances of a person of unsound mind (not being an idiot or a lunatic so found), and of a drunken person, are voidable, subject to the conditions specified in Bk. I, §§ 64, 65, 69, *ante*. The committee or quasi-committee of the estate of a lunatic, or of a person of unsound mind, or any person approved by the judge having jurisdiction in lunacy, may be authorized by the judge to convey the lunatic's land, or to exercise,[c] but not to release,[d] any power over or in respect of his land.

(a) *Beverley's Case* (1603) 4 Rep., at 126 b. (In this case it was said that the conveyance cannot be avoided by the idiot himself or his representatives, but only by the Crown on office found. *Quære*, as to the representatives. But see Littleton, s. 405.)

(b) *Re Walker* [1905] 1 Ch. 160 (C. A.). The testament of the same lunatic, executed shortly after the deed, and to a similar effect, was afterwards admitted to probate (*Estate of E. V. Walker* [1912] XXVIII T. L. R. 466.)

(c) Lunacy Act, 1890, ss. 116, 120, 124.

[It seems, however, that the quasi-committee of a lunatic not so found cannot be authorized to exercise the lunatic's statutory powers, or to give statutory consents, under the Land Clauses Consolidation Act, 1845, or the Settled Land Acts (*Re S. S. B.* [1906] 1 Ch. 712; *Re De Moleyns* [1908] 1 Ch. 110).]

(d) *Re Hirst* [1902] W. N. 177 (followed in *Re Rose* [1904] 2 Ch. 348).

Land of convict

1525. A convict cannot alienate, by act *inter vivos*,[a] land belonging to him beneficially,[b] other than land acquired by him while he is lawfully at large under license;[c] but land belonging to a convict as trustee or mortgagee does not pass to his administrator under the Forfeiture Act, 1870.[d] Any administrator, in whom property beneficially belonging to the convict is vested, may alienate the same as he shall see fit;[e] but he cannot effect a disentailing assurance of an estate tail belonging to the convict.[f]

(a) For the definition of convict, see Forfeiture Act, 1870, s. 6. The testament of a convict is (probably) valid (*Ex parte Graves* (1881) 19 Ch. D. 1).
(b) Forfeiture Act, 1870, s. 8.
(c) *Ibid.*, s. 30.
(d) Trustee Act, 1893, s. 48.

[It will be observed that this provision does not expressly empower the convict to act as mortgagor or trustee. But, presumably, that is the result, so long as the property is vested in him.]

(e) Forfeiture Act, 1870, s. 12.
(f) *Gaskell's and Walters' Contract* [1906] 2 Ch. 1.

[Probably, however, a disentailing assurance executed by the convict himself will enlarge his estate; though it will not operate to transfer the estate to another person (*ibid.*).]

Bankrupt's property

1526. A trustee in bankruptcy may sell all or any part of the property of the bankrupt vesting in him,[a] and deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt

with it.[b] The trustee may also exercise all such powers in, over, or in respect of property as might have been exercised by the bankrupt for his own benefit;[c] but not powers vested in the bankrupt as a trustee by statute or otherwise.[d]

(a) Bankruptcy Act, 1883, s. 54 (2).

['The property' means the property divisible among the creditors (*Ibid.*, s. 44).]

(b) *Ibid.*, s. 20 (1), 56.

(c) *Ibid.*, s. 56 (4). In the opinion of Farwell, L. J., the right to release a limited power does not pass to the trustee; even though such release would increase the bankrupt's estate (*Re Rose* [1904] 2 Ch. 348). But the order was afterwards discharged by consent, on the ground that all the parties who might be affected by it were not present at the hearing (*Re Rose* [1905] 1 Ch. 94).

(d) e. g. the powers of the bankrupt as limited owner under the Settled Land Acts (*ante*, Sect. VI, Tit. II) remain in the bankrupt (*Re Mansel's Settled Estates* [1884] W. N. 209, *per* Kay, J.). Probably the consent of the trustee in bankruptcy to the exercise of such powers would not be necessary; though, doubtless, he might apply to the Court to prevent a disastrous or fraudulent exercise of the bankrupt's powers.

B—CHATTELS CORPOREAL

SECTION VIII

POSSESSION OF CHATTELS CORPOREAL

TITLE I—ACQUISITION AND LOSS OF POSSESSION

Acquisition

1527. Possession of chattels corporeal is acquired by (i) taking, (ii) delivery.

[For the nature of possession of chattels, according to English Law, see the well-known work *Possession in The Common Law* (Clarendon Press, 1888), by Sir Frederick Pollock and the late Sir R. S. Wright. Briefly, any power to control generally the user and location of a chattel, other than the mere physical power exercised by a servant to whom a chattel has been entrusted by his master, is possession for the purposes of English Civil Law (*Charlesworth* v. *Mills* [1892] A. C., at p. 237, *per* Lord Halsbury, C.). The legal position of the loser of chattels is obscure; but, *semble*, he can bring trespass and, therefore, he retains possession, until he has given up hope of recovering them (*Isaack* v. *Clark* (1615) 2 Bulstr., at p. 312).]

Taking

1528. The person who assumes effective [a] physical control over a chattel corporeal acquires the possession of such chattel; [b] whether or not the chattel was at the time in the possession of another person.[c]

(a) *Young* v. *Hichens* (1844) 6 Q. B. 606.

(b) *Armorie* v. *Delamirie* (1722) 1 Stra. 505.
Bridges v. *Hawkesworth* (1851) 21 L. J. Q. B. 75.
Charlesworth v. *Mills* [1892] A. C. 231.
(c) *R.* v. *Riley* (1853) 1 Dears. 149.

[Even a thief acquires possession (*Mason* v. *Lickbarrow* (1790) 1 H. Bl., at p. 360, *per* Lord Loughborough, C. J.).]

Chattels on and in land

1529. A man who has possession of land to which the public have not access [a] is deemed to have taken possession of all chattels corporeal on or in the land; whether he is aware of their existence or not.[b]

(a) *Bridges* v. *Hawkesworth* (1851) 21 L. J. Q. B. 75.
(b) *Elwes* v. *The Brigg Gas Co.* (1886) 33 Ch. D. 562.
South Staffordshire Water Co. v. *Sharman* [1896] 2 Q. B. 44.
G. E. R. Co. v. *Lord* [1909] A. C. 109.

[The first of these last three cases shows that one person may have possession of the surface and another of the sub-soil, for this purpose; while the third raises very difficult questions between landlord and tenant. Presumably the doctrine of the text extends also to give to the possessor of a movable the possession of its contents (*Cartwright* v. *Green* (1803) 8 Ves. 406; *Merry* v. *Green* (1841) 7 M. & W. 623).]

Delivery

1530. Delivery of a chattel corporeal is effected by a release of his control by the former possessor, with the intent that another person shall acquire control,[a] followed by an effective taking of control of such chattel by such other person.[b]

(a) *Rooth* v. *Wilson* (1817) 1 B. & Ald. 59.
Moore v. *Robinson* (1831) 2 B. & Ad. 817.
Dixon v. *Yates* (1833) 5 B. & Ad. 313.
The Winkfield [1902] P. 42.

(b) *Reddel* v. *Dobree* (1839) 10 Sim. 244.
Wood v. *Tassell* (1844) 6 Q. B. 234.
Hilton v. *Tucker* (1888) 39 Ch. D. 669. (This case, if correctly decided, shows that the "taking" of control on delivery will be presumed where it is clearly feasible.)

[Where several chattels are intended to be disposed of by one transaction, taking control of part by the intended deliveree is, if so intended by both parties, equivalent, for some purposes, to taking possession of the whole (*Slubey* v. *Heyward* (1795) 2 H. Bl. 504; *Hammond* v. *Anderson* (1803) 1 B. & P. N. C. 69; *Kemp* v. *Falk* (1882) L. R. 7 App. Ca., at p. 586, *per* Lord Blackburn). In the Sale of Goods Act, 1893, 'delivery' means, unless the context or subject-matter otherwise requires, the 'voluntary transfer of possession from one person to another' (s. 62 (1)). This definition seems to be quite consistent with that in the text, but does not explain much of the nature of delivery generally.]

Delivery order

1531. Where specific and ascertained goods are in the custody of a wharfinger or warehouseman, as agent for the owner, an order by the latter to the wharfinger or warehouseman, directing him to hold the chattels at the disposal of another person, will, when assented to by the wharfinger or warehouseman, be equivalent to a delivery to such other person by the person giving the order.

Lucas v. *Dorrien* (1817) 7 Taunt. 278.
Godts v. *Rose* (1855) 17 C. B., at p. 235, *per* Williams, J.
Pearson v. *Dawson* (1858) E. B. & E., at p. 456, *per* Lord Campbell, C. J.

[The rule holds, even when the deliveror and the warehouseman are the same person (*Castle* v. *Sworder* (1861) 6 H. & N. 828). But a mere delivery order has not the effect of changing the possession, until it is assented to by the wharfinger or warehouseman (*McEwan* v. *Smith* (1849) 2 H. L. C. 309). And, where unas-

certained goods have been the subject of a sale or other transaction, a delivery order does not pass possession until the goods have been weighed or otherwise ascertained (*Hawes* v. *Watson* (1824) 2 B. & C. 540; *Mordant* v. *British Oil Mills* [1910] 2 K. B. 502). An indorsement and delivery of a dock warrant issued by a dock company has by custom much the same effect as the giving of a delivery order (*Zwinger* v. *Samuda* (1817) 7 Taunt. 265).]

Delivery longi manu

1532. Delivery may be effected by handing to and acceptance by the deliveree of a key or other means by which the deliveree may obtain access to the chattels intended to be delivered; but the handing over and acceptance of a mere symbol of ownership or possession will not be a delivery of the chattels symbolized.

Jones v. *Selby* (1710) Pre. Cha. 300.
Ward v. *Turner* (1751) 2 Ves. Sen., at p. 443, *per* Lord Hardwicke, C.
Hilton v. *Tucker* (1888) 39 Ch. D. 669.

Loss of possession

1533. Possession is divested by (i) abandonment, (ii) taking, of a chattel corporeal.

[In the case of *Peruvian Guano Co.* v. *Dreyfus* [1892] A. C. 166, certain expressions of some of the learned lords might lead to the conclusion that the mere appointment of a receiver by the Court would of itself divest the possession of the then possessor of the goods. But it appears that, in fact, the goods had been actually delivered to the receiver. (*Ibid.*, at p. 169.)]

Finding

1534. Where the control of a chattel corporeal has been intentionally abandoned by its former pos-

sessor, he ceases to have possession of it; and the finder of the chattel who takes it acquires possession of it.

R. v. *Glyde* (1868) 1 C. C. R., at p. 141, *per* Cockburn, C. J.

[*Semble:* the finder acts at his own risk, so far as civil trespass is concerned (*Merry* v. *Green* (1841) 7 M. & W. 623). But if he has no reason to believe that the chattel has been accidentally lost, nor any reason for thinking that the loser can be found, he is not guilty of larceny if he appropriates it (*R.* v. *Glyde*, *ubi sup.*; *R.* v. *Knight* (1871) 12 Cox, 102).]

Taking

1535. Taking, lawful or unlawful, by another person of a chattel deprives the former possessor of possession.

Y. B. 21 Edw. IV. [1482] Hil. pl. 6, at fo. 74, *per* Brian, C. J.
Y. B. 4 Hen. VII [1489] Pasch. pl. 1, at fo. 5, *per* Hussey, C. J.

[One of the most common cases of lawful taking is by a sheriff or County Court bailiff under a writ of execution (*Charlesworth* v. *Mills* [1892] A. C. 231). Goods seized by a private distrainor are, however, deemed to be in the possession of the distrainee until actually removed from the premises (*Whitley* v. *Roberts* (1825) McCle. & Yo., at p. 118, *per* Hullock, B.; and it would seem that a sheriff has not possession of goods of the existence of which, though they were on the premises, he was unaware (*Johnson* v. *Pickering* [1908] 1 K. B. 1).]

Chattels of deceased

1536. The possession of chattels corporeal which were in the possession of a deceased person at the time of his decease is deemed to have vested in his

executor [a] or administrator [b] at the moment of his decease.

(a) *Fisher* v. *Young* (1614) 2 Bulstr. 268.
(b) Y. B. 36 Hen. VI (1457) Mich. pl. 4, at fo. 8.
Long v. *Hebb* (1652) Style, 341, *per* Rolle, C. J.
Tharpe v. *Stallwood* (1843) 5 M. & G. 760.

TITLE II — RIGHTS AND LIABILITIES OF POSSESSORS

Rights

1537. The possessor of a chattel corporeal has the following rights, viz. : —

(i) to defend his possession by force if necessary (except as against a person entitled to deprive him of it), and to retake possession against any one who has wrongfully deprived him of it;

Bk. I, Sect. VI, §§ 176–7, *ante.*

(ii) to bring actions in the nature of Trespass, Trover, Detinue, and Replevin, against any one wrongly interfering with, or depriving him of, his possession.

Bk. II, Pt. III, Sect. III, Titt. I–III, *ante.*

Liabilities

1538. The possessor of animals or other chattels corporeal is liable for damage caused by such animals or other chattels to the extent specified in §§ 778, 780, 781, 784, 852, *ante.*

Bk. II, Pt. III, Sects. I, II.

[Generally speaking, the mere possessor of chattels is not, as such, liable for damage to other persons caused by them. But of course he may be made liable for intentional or negligent use of them. The nature of the wrong thus committed will depend, according to the classification adopted by the English Law of Torts (*ante*, Bk. II, Pt. III), upon the nature of the damage caused.]

SECTION IX

OWNERSHIP OF CHATTELS CORPOREAL

TITLE I—GENERAL

Restrictions on ownership

1539. The user and disposition of chattels corporeal cannot, except in the case of patented articles,[a] be subjected to any conditions or restrictions, in such a manner as to bind owners generally;[b] and, in the case of patented articles, such conditions and restrictions are only binding on persons who take with notice of them,[c] and subject to the provisions of the Patents and Designs Act, 1907.

(a) *Incandescent Light Co.* v. *Cantelo* (1895) 12 R. P. C. 262, *per* Willes, J., approved in *National Phonograph Co.* v. *Menck* [1911] A. C. 336 (P. C.).

(b) *Taddy* v. *Sterious* [1904] 1 Ch. 358. *McGruther* v. *Pitcher* [1904] 2 Ch. 306.

(c) *National Phonograph Co.* v. *Menck, ubi sup.*, at p. 351. (This is contrary to the opinion expressed (*obiter*) by Buckley, J., in *Badische Anilin Fabrik* v. *Isler* [1906] 1 Ch., at p. 611.)

[The rule in the text only applies to attempts to bind purchasers *in rem*, not to contractual restrictions.]

Successive interests in chattels

1540. No successive interests or estates can be created in chattels corporeal;

Re Walker [1908] 2 Ch. 705.

But —

(i) chattels corporeal (not being consumable goods) may, subject to the Rule against Perpetuities, be vested by deed or testament in trustees upon trust to permit one or more persons to enjoy, simultaneously or successively, the use of them for life or years, with a subsequent trust for the benefit of other persons;

Hoare v. *Parker* (1788) 2 T. R. 376 (testament).
Lord Scarsdale v. *Curzon* (1859) 1 J. & H. 40 (deed).
Re Hill [1902] 1 Ch. 807 (testament).
Re Lord Chesham's Settlement [1909] 2 Ch. 329 (deed).
Re Thynne [1911] 1 Ch. 283 (testament).

[The cases stop at a life estate; and any attempt to limit an estate tail in chattels vests the property in the tenant-in-tail absolutely (*Re Lord Chesham's Settlement*, *ubi sup.*, at p. 333, *per* Cozens-Hardy, M. R.). Owing to the fact that there can be no contingent remainder, strictly speaking, in chattels, where personalty is vested in trustees for the benefit of A for life, and, after A's death, for the benefit of the members of a class, the membership of that class will be closed when it becomes necessary to distribute the fund — i. e. generally, when one member of the class attains a vested interest (*Andrews* v. *Partington* (1791) 3 Bro. C. C. 401). But the rule is only one of construction; and if the settlor has clearly postponed the distribution of the fund (e. g. by a lawful direction to accumulate the income) the class will not be closed until the expiry of the period of postponement (*Re Stephens* [1903] 1 Ch. 322).]

(ii) such chattels may, subject to the same Rule, be bequeathed directly to one person, with an executory limitation over (*ante*, § 1183) in favour of another;

Jolly v. *Wills* (1678) 2 Rep. in Cha. 72.
Hyde v. *Parratt* (1695) 1 P. Wms. 1.
Foley v. *Burnell* (1783) 1 Bro. C. C. 274.

Re Tritton (1889) 69 L. T. 301.
Myers v. *Washbrook* [1901] 1 Q. B. 360.

[But a very little earlier the contrary had been held (*Warner* v. *Borsly* (1679) 2 Rep. in Cha. 79).]

(iii) the possession of chattels corporeal may, by way of hire, loan, deposit, or other bailment (*ante*, Bk. II, Pt. II), be vested in one person, the ownership remaining in another.

[This is, of course, not, strictly, a case of successive, but of concurrent interests.]

Remedy of owner

1541. An owner of chattels corporeal has in respect of injury to his ownership the remedy described in § 890, *ante*, Bk. II, Pt. III, Tit. IV.

[Of course, if the owner is in possession, he will also have, and will naturally prefer, his possessory remedies.]

Specific delivery

1542. Where a chattel of a rare and peculiar value, for the loss of which damages would not be an adequate remedy,[a] is unlawfully withheld from the person entitled to it, or where any chattel has been withheld from the person entitled to it, by an abuse of fiduciary relationship,[b] the Court, in the exercise of its equitable jurisdiction, may order the person in whose hands such chattel is, to yield or restore it to the person entitled, on pain of imprisonment.

(a) *Pusey* v. *Pusey* (1684) 1 Vern. 273.
D. of Somerset v. *Cookson* (1735) 3 P. Wms. 390, and compare *North* v. *G. N. R.* (1860) 2 Giff., at p. 69.

(b) *Fells* v. *Read* (1796) 3 Ves. Jun. 71.
Lowther v. *Lowther* (1806) 13 Ves. 95.
Wood v. *Rowcliffe* (1847) 2 Ph. 382.

[Owing to the improvement in the common law remedies for the recovery of chattels (*ante*, Bk. II, Pt. III, Sect. I, Tit. VII, § 810), this branch of equitable jurisdiction is now of less importance than before. But (*semble*) it is still in existence. Like all equitable remedies, it will be given only on equitable terms (*Lodge* v. *National Union Invest. Co.* [1907] 1 Ch. 300).]

Liabilities of owner

1543. The owner of a chattel corporeal (not being a possessor), other than the owner of a dog under the Dogs Act, 1906, is not liable as such for any damage caused by the chattel.

[Whilst it is difficult to find any positive authority for this statement, the absence of any form of action by which a personal liability could be enforced against an owner of chattels, merely as such, is almost conclusive negative authority. Liabilities in respect of cattle, wild animals, and dangerous substances (*ante*, Book II, Pt. III, Sect. I, Tit. V, §§ 778–785, 852) are liabilities attached to 'keeping' or possession; and it may well be doubted whether even the Dogs Act, 1906, though it employs the term 'owner,' does not really mean 'possessor.' Many liabilities in respect of chattels may arise out of contract (e. g. liability to a carrier for inflammable or explosive goods, *ante*, § 579), and some out of tort (e. g. negligence in handling goods or putting them into circulation, *ante*, § 731 (ii) (iv)); but in these the question of ownership is quite immaterial. The owner of animals may, however, be made indirectly to suffer for damage done by them, through the remedy of distress *damage feasant* (*ante*, Bk. I, Sect. VI, § 180).]

Prohibition against alienation

1544. Any prohibition against alienation attached to the gift of chattels corporeal, other than a restriction affecting a life interest (*ante*, Sect. I, Tit. IV, § 1079)

or the interest of a married woman (*ante*, Bk. I, §§ 105–108), is void.

Bradley v. *Peixoto* (1797) 3 Ves. 324.
Corbett v. *Corbett* (1888) 14 P. D. 7.
Dugdale v. *Dugdale* (1888) 38 Ch. D. 176.

[The power of the Court to remove the 'restraint on anticipation' in the interests of the married woman, is now regulated by the Conveyancing Act, 1911, s. 7, which repeals s. 39 of the Act of 1881.]

Provision for devolution

1545. Any attempt, by the transferor of a chattel corporeal, to provide for the devolution of the chattel after the death intestate of the transferee to whom an absolute interest in such chattel has been transferred, is void.

Holmes v. *Godson* (1856) 8 D. M. & G. 152.
Re Dixon [1903] 2 Ch. 458.

Franchise

1546. The person in whom a franchise of treasure trove, waif, stray, wreck, free fishery, royal fish, or free warren (*ante*, Sect. I, Tit. IX, §§ 1224–1235) is vested, has such a property in the chattels being the subject of such franchises, as will enable him to recover such chattels or their value, by seizure or action, from any person unlawfully attempting to convert them to his own use.

Y. B. 21 Hen. VIII (1529) Mich. pl. 2, fo. 9.
Sutton v. *Moody* (1697) 1 Ld. Raym. 250, *per* Holt, C. J.
Biddulph v. *Ather* (1755) 2 Wils. 23.
Bailiffs of Dunwich v. *Sterry* (1831) 1 B. & Ad. 831.
Blades v. *Higgs* (1865) 11 H. L. C., at p. 633, *per* Lord Westbury, C.

Game

1547. The person who is entitled *ratione soli* to kill the game on a particular area has a similar property in such game, if it is captured or killed within such area, but not otherwise.

Sutton v. *Moody* (1697) 1 Ld. Raym. 250.
Churchward v. *Studdy* (1811) 14 East, 249.
Lonsdale v. *Rigg* (1857) 1 H. & N. 923.
Blades v. *Higgs* (1865) 11 H. L. C. 621.

Equitable ownership of chattels

1548. Chattels corporeal may be the subject of equitable ownership; and such equitable ownership will be protected in the same manner, and subject to

the same limitations, as legal ownership, except that it will not be protected against a *bonâ fide* purchaser for value who has obtained the legal ownership in the same chattels.

Joseph v. *Lyons* (1884) 15 Q. B. D. 280.
Hallas v. *Robinson* (1885) *ibid.*, 288.

[There have been very few decisions on the nature of equitable ownership of chattels corporeal; but, probably, the same principles as those regulating equitable interests in land (*ante*, Sect. I, Tit. XI, §§ 1313–1321) would apply. It should be remembered, however, that even legal ownership (and, therefore, *a fortiori*, equitable ownership) of chattels corporeal may be defenceless against risks which do not affect interests in land, e. g. 'apparent possession' of a bankrupt, sale in market overt, &c. These risks have been, or will be, duly noted in their proper places. It is also very doubtful whether the equitable doctrines of constructive and imputed notice of equitable interest (*ante*, Sect. I, Tit. XI, § 1316) have any application to chattels corporeal. Certainly the doctrine of constructive notice has not, when these chattels have been made the subject of a commercial transaction (*Manchester Trust* v. *Furness* [1895] 2 Q. B., at p. 545, *per* Lindley, L. J.; *Lloyds' Bank* v. *Swiss Bankverein* (1913) XXIX T. L. R. 219). Of course, the Statute of Uses has no application to chattels (*Hinson* v. *Burridge* (1594) Moo. 701).]

Paraphernalia

1549. (*Semble*) Personal ornaments and articles of wearing apparel given by a husband to his wife, not for her separate use,[a] but in order to maintain the credit of his establishment, cannot be alienated by the wife during the marriage,[b] and remain liable to satisfy the husband's debts during his lifetime and after his decease.[c] But, if the husband does not alienate them during his lifetime, he cannot deprive his wife of them by

testament, nor do they pass to his personal representatives after his decease.[d]

(a) *Tasker* v. *Tasker* [1895] P. 1.
(b) *Graham* v. *Londonderry* (1746) 3 Atk. 393.
(c) But not until all other assets, including land and specific legacies, have been exhausted (*Tynt* v. *Tynt* (1729) 2 P. Wms. 542).
(d) *Hastings* v. *Douglas* (1632) Cro. Car. 343. (In this case the Court allowed a bequest by the husband; but admitted that, had he died intestate, the chattels would have gone to the widow.)
Tipping v. *Tipping* (1721) 1 P. Wms. 729.
Seymore v. *Tresilian* (1737) 3 Atk. 358, *per* Lord Hardwicke, C.

[Since the passing of the Married Women's Property Act, 1882, it has been admittedly more difficult than before to establish a case of paraphernalia; and though, in *Tasker* v. *Tasker*, *ubi sup.*, Jeune, P., expressed the opinion that the Act had not affected the principles of the subject, this *dictum* was severely criticized by the Court of Appeal in *Masson* v. *De Fries* 1909] 2 K. B. 831, Farwell, L. J., stating (p. 833) that 'since the Married Women's Property Act, 1882, there can be no question of paraphernalia.' The same learned judge, however, in his judgment (p. 839) admits that chattels may in fact be given by a husband to his wife on terms which correspond with the old position of paraphernalia. It is, of course, necessary to distinguish paraphernalia, not only from chattels which are the separate property of the wife, but from ordinary articles of domestic furniture, and from settled chattels (*ante*, § 1486), which the wife is permitted to use, but in which she has no legal interest.]

Heirlooms

1550. Chattels which by special custom are held along with the tenure of a freehold estate of inheritance cannot be severed by testament from such estate, but pass beneficially to the heir (? or devisee) along with the estate.

Co. Litt. 185 b.
Corven's Case (n. d.) 12 Rep. 105.
Hill v. *Hill* [1897] 1 Q. B., at pp. 494, 495, *per* Chitty, L. J.

[The heir may bring Trover for the heirloom (*Pusey* v. *Pusey* (1684) 1 Vern. 273, *per* North, L. K.). In ordinary language, the

term 'heirloom' is used to describe chattels settled to follow so far as possible the devolution of the land (*ante*, § 1486). But these have not the peculiar legal character of heirlooms, e. g. they are pure personalty, and vest absolutely in the first taker of an estate of inheritance in the land who attains twenty-one.]

NOTE ON EQUITABLE RIGHTS GENERALLY

It seems desirable, regard being had to the manner in which equitable principles have been introduced into English law, to state here conspicuously that, despite the provisions of the Judicature Acts, all equitable rights, whether in the nature of property or merely equitable claims to relief against transactions vitiated by undue influence, mistake, or other equitable defect (*ante*, Bk. I, §§ 81–9) or to equitable remedies such as specific performance (*ante*, Bk. I, Pt. I, §§ 286–292) are subject to two important conditions, viz., (i) that they can only be enforced in the discretion of the Court and on terms which the Court thinks fair, (ii) that they can never be enforced against *bonâ fide* acquirers for value of the legal title, who had no notice of the equitable right or claim when they gave their value. If this last condition seems strange in the face of the well-known provision of the Judicature Act, 1873 (s. 25 (11)), that 'where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail,' the explanation is, that the rules of equity themselves always did recognize the unimpeachable position of the purchaser for value of the legal title, acquired without notice of equitable claims. In fact, the Judicature Acts, though fusing tribunals, have not by any means fused law and equity.

SECTION X

ACQUISITION OF OWNERSHIP OF CHATTELS CORPOREAL

TITLE I—ABSOLUTE ACQUISITION

Acquisition

1551. Ownership of chattels corporeal may be acquired absolutely by (i) capture or taking, (ii) production, (iii) delivery, (iv) deed, (v) transfer of bill of lading, (vi) sale.

Appropriation

1552. Chattels which have been abandoned by their former owner without passing into the possession of other persons,[a] goods belonging to an alien enemy,[b] animals *feræ naturæ*, and other *res nullius* become (subject to §§ 1546 and 1547, *ante*, and to the rights of the Crown) the property of any person who appropriates them with the intention of acquiring them for his own benefit.

(a) Blackstone, *Comm.* II, 9.

[Presumably, the onus of proving abandonment, if the former owner put in a claim, would be on the taker or finder. But the finder of an apparently ownerless chattel is entitled to it, by virtue of his possession, as against all persons other than the owner (*Armorie* v. *Delamirie* (1722) 1 Str. 505; *Bridges* v. *Hawkesworth* (1851) 21 L. J. Q. B. 75); unless he is an employee who has

found the article on his employer's land while engaged in the work of his employer (*S. Staff. Water Co.* v. *Sharman* [1896] 2 K. B. 44). It should be carefully noted that 'abandonment,' for purposes of this §, means abandonment of ownership as well as possession.]

(b) Y. B. 7 Edw. IV, Tr. (1467) pl. 5, fo. 14.
Radley v. *Eglesfield* (1671) 1 Ventr. 174. (But in order to change the property in a ship, it must be brought into a port of the captor's country (*Anon.* (1641) March, 188–9).)

[The right to appropriate goods belonging to an alien enemy, though it may exist in theory, is, so far as the armed forces of the Crown are concerned, practically abolished by the Army Prize Money Act, 1832, and the Naval Prize Act, 1864. And the subject of an enemy state who resides in this country under license from the Crown, is not an alien enemy for this purpose.]

Young of animals

1553. The offspring of animals is the property of the owner of the female parent; except in the case of swans, where the offspring belong equally to the owners of both parents.

Prior of Huley's Case, Y. B. 18 Edw. III, Mich. (1344) pl. 55, fo. 48.
Y. B. 12 Edw. IV, Pasch. (1472) pl. 10, fo. 5.
Case of Swans (1592) 7 Rep. at 17 a.

[Apparently the Roman doctrine of *specificatio*, though stated as part of English law by text-book writers, has not been judicially accepted (Y. B. 5 Hen. VII, Tr. (1490) pl. 6, fo. 15; *Anon.* (1560) Moo. 19). But there are *dicta* in the older case to the effect that if the character of a stranger's material has been wholly changed, the stranger cannot retake it. There are also *dicta* to the effect that, if A mingles his chattels with B's, in such a way that they cannot be distinguished, A loses his property (*Ward* v. *Eyre* (1615) 2 Bulstr. 323).]

Delivery

1554. Any delivery of chattels corporeal (*ante*, Sect. VIII, Tit. I, § 1530) by an owner or person

entitled to dispose of the ownership thereof, with intent to pass the ownership, will confer ownership on the deliveree.[a] Delivery of current money of the realm (including bank notes) as such, to a person who takes it *bonâ fide* and for valuable consideration, vests the property in the taker; whether the deliveror had any title thereto, or right to deal with the same, or not.[b]

(a) *Bridget Clark's Case* (1588) 2 Leon. 30, 89.

[This decision is interesting as showing that it is immaterial that the delivery is made for a special purpose. It was said by Dodderidge, J., in *Wiseman* v. *Denham* (1623) Godb. 330, that mere tender of 'a thing which the party ought to have' changes the property. But the Court was divided in opinion whether a good tender had been pleaded.]

(b) *Miller* v. *Race* (1758) 1 Burr. 452.
Clarke v. *Shee* (1774) 1 Cowp., at p. 200, *per* Lord Mansfield, C. J.

[If, however, the coins or notes in question were not passed away as money, but as specific articles, the rule does not apply (*Moss* v. *Hancock* [1899] 2 Q. B. 111).]

Loan for consumption

1555. The ownership of chattels corporeal which are the subject of a loan for consumption passes to the borrower on the delivery of the chattels to him.

Doctor and Student, II, 38.
Grounds and Maxims (Noy) 91.
Essay on Bailments (Sir W. Jones) 65.

[It is as curious as it is suggestive, that not a single case of a loan for consumption (other than a loan of money, as to which see Bk. II, Pt. II, Sect. III, Tit. II, *ante*), appears in the ordinary Reports; though, possibly, a careful search of the Year Books would reveal such cases. For it seems impossible to doubt that, for example, if A lends B a motor tyre on an emergency, he can recover a similar article or its value from B by some form of action.]

1556. Gift or exchange of a chattel corporeal, without delivery or deed, is not effectual to pass the ownership;[a] unless the chattel is already in the possession of the intended donee.[b] *Gift without possession*

(a) *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551.
Cochrane v. *Moore* (1890) 25 Q. B. D. 57 (overruling *Danby* v. *Tucker* (1883) 31 W. R. 578, and *Re Ridgway* (1885) 15 Q. B. D. 447).

[The rule is the same in *donationes mortis causa* (*post*, Bk. V). See *Bunn* v. *Markham* (1816) 2 Marsh. 532, approved in *Irons* v. *Smallpiece*, *ubi sup.*]

(b) *Cain* v. *Moon* [1896] 2 Q. B. 283.
Re Weston [1902] 1 Ch. 680.
Rawlinson v. *Mort* (1905) 93 L. T. 555.

[The first two of these were cases of *donatio mortis causâ*. But it was assumed in both that the rule applied also to gifts *inter vivos*.]

1557. Ownership of a chattel corporeal may be transferred (subject to the Bills of Sale Act, 1878) by a deed expressing an unequivocal intention to that effect, without delivery of the chattel, and without valuable consideration. Acceptance of such ownership on the part of the intended transferee will be presumed; unless there is evidence of disclaimer by him. *Deed*

Y. B. 7 Edw. IV (1467) Mich. pl. 21, fo. 20.
Butler's and Baker's Case (1591) 3 Rep., at 26 b.
Siggers v. *Evans* (1855) 5 E. & B. 367.
Standing v. *Bowring* (1885) 31 Ch. D. 282. (This was a case of stock; but the general rule was affirmed.)
Cochrane v. *Moore* (1890) 25 Q. B. D., at pp. 67, 68, *per* Fry, L. J.

[One result of the rule stated in this § is, that a donor cannot revoke a gift by deed, even though there is no acceptance or delivery; if the donee was intended to take any beneficial interest under it.

It is otherwise if the donee is a mere mandatory to carry out the intentions of the donor (*Siggers* v. *Evans*, *ubi sup.*). It appears by *Flory* v. *Denny* (1852) 7 Exch. 581, that the ownership of chattels may be transferred by writing not under seal, or even by word of mouth, for value. *Quære:* is this anything more than a sale? Such a document would now clearly fall within the provisions of the Bills of Sale Act, 1878.]

Future-acquired chattels

1558. A purported assignment of chattels corporeal of which the assignor is not owner, and over which he has no present power of disposition, does not convey the legal ownership of such chattels; even if the assignor subsequently acquires the ownership or power to dispose of them.[a] But an assignment, if made for valuable consideration, of such chattels[b] will be treated as a contract to assign, and, if such as the Court will enforce specifically (*ante*, Bk. II, Pt. II, Sect. III, Tit. II, §§ 286–292) will pass the equitable ownership of such chattels to the assignee, so soon as the assignor acquires such ownership or power.[c]

(a) *Lunn* v. *Thornton* (1845) 15 M. & W. 379.
Holroyd v. *Marshall* (1862) 10 H. L. C., at p. 211, *per* Lord Westbury, C.

(b) There was at one time a doctrine that the assignor must have a 'potential' interest in the after-acquired chattels (*Grantham* v. *Hawley* (1615) Hob. 132). But this doctrine appears to have been overruled by *Tailby* v. *The Official Receiver* (1888) L. R. 13 App. Ca. 523.

(c) *Langton* v. *Horton* (1842) 1 Ha. 549.
Petch v. *Tutin* (1846) 15 M. & W. 110.
Holroyd v. *Marshall*, *ubi sup.*
Collyer v. *Isaacs* (1881) 19 Ch. D. 342.

[As in the case of equitable interests in land, this equitable ownership will not be enforceable against a purchaser for value of

the legal ownership in the chattels without notice of the equity (*Joseph* v. *Lyons* (1884) 15 Q. B. D. 280; *Hallas* v. *Robinson* (1884) *ibid.*, 288).]

Absolute bill of sale

1559. Subject to § 1560, an assignment by deed of chattels which remain in the possession of the assignor will be void against the trustee in bankruptcy of the assignor, and against execution creditors of the assignor; unless it complies with the requirements of s. 8 of the Bills of Sale Act, 1878.

Bills of Sale Act, 1878, s. 8.

[The requirements of the section are (1) attestation by a solicitor stating that the effect has been explained by him to the assignor, (2) registration within seven days of execution (there is a provision in s. 9 against evasion of the Act by the execution of a succession of assignments within successive periods of seven days), (3) statement of the consideration for which the assignment was given. It should be noted that by the defining section (s. 4) of the Act, the term 'bill of sale' includes many documents which would not, apparently, pass the ownership in the goods at all; and it would seem that the existence of unregistered documents of such kind is not fatal to a transaction, unless it is necessary to rely upon them in proof of title (*M. S. & L. Ry. Co.* v. *North Central Wagon Co.* (1888) L. R. 13 App. Ca. 554; *Charlesworth* v. *Mills* [1892] A. C. 231). An absolute assignment which does not comply with the requirements of the Act of 1878, may, nevertheless, be valid as between the parties (*Tuck* v. *Southern Bank* (1889) 42 Ch. D. 471). But, subject to this reservation, absolute assignments take effect in order of registration, not of date (Bills of Sale Act, 1878, s. 10, *ad fin.*). It was laid down generally in *Re Standard Manufacturing Co.* [1891] 1 Ch. 627, that corporations, at any rate limited companies within the Companies Acts, are not within the provisions of the Bills of Sale Act, 1878. But it is right to point out that the judgment of the Court dealt mainly, if not entirely, with securities, and especially debenture securities.]

Exempted transactions

1560. The provisions of the Bills of Sale Act, 1878, do not apply to assignments for the benefit of the creditors of the assignor, marriage settlements, transfers of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or other documents of title used in the ordinary course of business for the transfer of goods.

Bills of Sale Act, 1878, s. 4.

Transfers of shares in ships

1561. The ownership of a registered British ship or of any share therein can only be transferred by an attested bill of sale, containing the particulars required by the Merchant Shipping Acts, and registered at the ship's port of registry.

Merchant Shipping Act, 1894, ss. 24–26.

[Changes of ownership arising from marriage, death, bankruptcy, or causes other than voluntary transfer must also be registered (ss. 27–29); and no equitable interest or any notice of trust may be registered. But equitable interests in ships may be enforced personally against the legal owners in the same way as other equitable interests in personalty (ss. 56, 57). Certain small vessels engaged in coasting and river service are exempt from registration (s. 3).]

Bills of lading

1562. An owner or person entitled to dispose of the ownership of goods [a] in course of transit by sea,

or awaiting delivery in the hands of the shipowner after such transit,[b] may pass the ownership therein by indorsement and delivery to another person of a bill of lading [c] of such goods, or, if the bill of lading is indorsed in blank, by delivery only of such bill.[d] Such delivery, if made for valuable consideration, will be effectual against the right of stoppage *in transitû* of an unpaid vendor of the goods.[e]

(a) The holder of a bill of lading is not in the position of the holder of a bill of exchange. 'The transfer of the document of title . . . has no greater effect at common law than the transfer of the actual possession' (*Cole* v. *N. W. Bank* (1875) L. R. 10 C. P., at p. 363, *per* Blackburn, J.).

(b) *Meyerstein* v. *Barber* (1866) L. R. 2 C. P. 38.

(c) (*Semble*) a bill which makes the goods deliverable only to the consignee cannot be transferred at law by indorsement or delivery (*Henderson* v. *Comptoir d'Escompte* (1872) L. R. 5 P. C. 253). But it would seem that delivery of it would pass an equitable title.

(d) *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, ultimately confirmed on appeal.
Meyerstein v. *Barber*, *ubi sup.*, at p. 45, *per* Erle, C. J.
Sanders v. *Maclean* (1883) 11 Q. B. D., at p. 341, *per* Bowen, L. J.

(e) *Lickbarrow* v. *Mason*, *ubi sup.*

Effect of transfer

1563. The consignee of goods named in a bill of lading, and every indorsee thereof to whom the property in the goods mentioned in the bill passes by reason of the consignment or indorsement, acquires all rights, and is subject to all liabilities, in respect of such goods, as if the contract contained in the bill had been made with himself.[a] Every bill of lading, in the hands of a consignee or indorsee for value, is conclusive evidence, against the person

signing the bill, of the shipment and condition of such goods.[b]

(a) Bills of Lading Act, 1855, s. 1.

[It should be noted that this section only applies where the property in the goods passes. It is clear from the Factors Act, 1889, s. 3, that a mere pledge of the goods covered by a bill of lading may be effected by dealing with the bill; and the difficulty of deciding whether a dealing does or does not pass the property is illustrated by the leading case of *Sewell* v. *Burdick* (1884) L. R. 10 App. Ca. 74 (*post*, Tit. II, § 1581). The § only applies to the actual holder of the bill; *e. g.* the consignee or an indorsee who indorses over before the arrival of the cargo loses both his rights and liabilities under the bill (*Smurthwaite* v. *Wilkins* (1862) 31 L. J. C. P. 214).]

(b) *Ibid.*, s. 3.
Compania Naviera v. *Churchill* [1906] 1 K. B. 237.
Martineaus v. *R. M. S. Co.* (1912) 106 L. T. 638.

Sale of goods

1564. A sale of specific or ascertained goods by an owner or person entitled to dispose of the ownership in such goods vests the ownership in the buyer at such time as the parties intend it to be vested.

Sale of Goods Act, 1893, s. 17.

[The term 'goods' in the Act is practically equivalent to 'chattels corporeal'; except that it does not include money (s. 62).]

When property passes without delivery

1565. In the absence of evidence of a different intention, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the ownership of the goods passes to the buyer at the time when the contract is made. If the seller is

bound to do some act to or in reference to the goods, for the purpose of putting them in a deliverable state or ascertaining the price, the ownership does not pass until such act has been done, and the buyer has notice thereof.

Sale of Goods Act, 1893, s. 18, rules 1–3.

['Deliverable state' means a state in which the buyer would, under the contract of sale, be bound to accept the goods (*ibid.*, s. 62).]

Sale on approval

1566. Where goods are delivered to the buyer 'on approval' or 'on sale or return,' or other similar terms, the ownership passes to the buyer when he (*a*) signifies his approval or acceptance to the seller, or does any other act adopting the transaction, or (*b*) without giving notice of rejection, retains the goods after the time fixed by the contract, or if no time has been fixed, after the expiry of a reasonable time.

Ibid., s. 18, rule 4.

[What is a 'reasonable time' is a question of fact.]

Sale of future goods

1567. On a contract for sale of unascertained or future goods by description, the ownership passes to the buyer when either he with the seller's assent, or the seller with his assent, has unconditionally appropriated to the contract goods of that description in a deliverable state. Such assent may be express or implied; and may be given before or after appropria-

tion. A delivery by the seller to a carrier or other bailee, for transmission to the buyer, without reservation of a right of disposal, is deemed to be an unconditional appropriation of the goods to the contract.

Sale of Goods Act, 1893, s. 18.

[For the law on the subject of the contract of sale of goods, see *ante*, Bk. II, Pt. II, Sect. I, Tit. I.]

Market overt

1568. A sale in market overt of goods there present,[a] of the kind for which the market is held,[b] to a *bonâ fide* purchaser, vests the property in such goods in the purchaser, even though the vendor had no title to the goods;[c] subject, in the case of stolen goods, to a claim by the former owner under a writ of restitution or otherwise, on a successful prosecution of the thief.[d] For the purposes of this §, 'market overt' means a market (*ante*, Sect. I, Tit. IX, §§ 1215–1219) or any other place enjoying a special privilege to that effect for the sale of such goods at the time of the sale, and, by the custom of London, any open shop within the limits of the City during business hours, in respect of goods usually exposed there for sale.[e]

(a) A sale by sample will not do; unless the bulk is also exposed in the market (*Crane* v. *London Dock Co.* (1864) 5 B. & S. 313).
(b) *Case of Market Overt* (1596) 5 Rep. 83 a.
(c) Sale of Goods Act, 1893, s. 22.

[In the case of horses, the protection is not obtained unless the formalities prescribed by the 31 Eliz. (1588) c. 12, have been ob-

served (*Moran* v. *Pitt* (1873) 42 L. J. Q. B. 47). And a sale in market overt does not bind the Crown (2 Inst. 713).]

(d) Sale of Goods Act, 1893, s. 24.
Scattergood v. *Sylvester* (1850) 15 Q. B. 506.
(e) *Case of Market Overt, ubi sup.*
Clifton v. *Chancellor* (1600) Moo. 624.
Lyons v. *De Pass* (1840) 11 A. & E. 326.
Clayton v. *Le Roy* [1911] 2 K. B. 1031.

[It is very doubtful whether the privilege covers a sale to the stallholder or shopkeeper (*Hargreave* v. *Spink* [1892] 1 Q. B. 25).]

Long possession

1569. (*Semble*) The ownership of chattels corporeal is not acquired by long possession; even though the action of the owner against the possessor for the time being is barred by lapse of time.

Putt v. *Roster* (1682) 2 Mod., at p. 319, *per Curiam.*
Miller v. *Dell* [1891] 1 Q. B., at p. 471, *per* Lord Esher, M. R.
London and Midland Bank v. *Mitchell* [1899] 2 Ch., at p. 166, *per* Stirling, J. (choses in action).

Appointment of chattels corporeal

1570. The rules, hereinbefore stated (Sect. VII, Titt. III and IV), restricting or prohibiting disposition of land in mortmain and for charitable trusts, have no application to chattels corporeal. Subject to this exception, and to the rules affecting the creation of successive interests in such chattels (*ante*, Sect. IX, Tit. I, § 1540), the law affecting the creation and exercise of powers of appointment and disposition of chattels corporeal is the same as the law affecting powers

of appointment and disposition of land (*ante*, Sect. VI, Tit. I).

[It is, again (see *ante*, § 1462) even more difficult, in the case of pure personalty, than in that of land, to point to a definite authority which requires the creation of powers to be by deed, or even by writing; for section 7 of the Statute of Frauds only applies to land. But, in practice, such powers are invariably created by deed or testament.]

TITLE II—ACQUISITION BY WAY OF SECURITY

Chattels as securities

1571. Chattels corporeal may be made a security for the payment of money by (i) mortgage, (ii) pledge, (iii) lien.

Mortgage of chattels

1572. Subject to the Bills of Sale Acts, 1878 and 1882, a mortgage of chattels corporeal may be effected by any means by which an absolute transfer of ownership of such chattels may be made (*ante*, Tit. I); provided that there is an intention to pass the ownership of the chattels by way of security for the payment of money. In such a case, the transferor or his successor in title will be able to redeem the chattels on payment of the amount secured, with interest, and costs, if any.

Ryall v. *Rolle* (1749) 1 Atk. 165.
Reeves v. *Capper* (1838) 5 Bing. N. C. 136.
Meyerstein v. *Barber* (1866) L. R. 2 C. P., at p. 51, *per* Willes, J.
Reeves v. *Barlow* (1884) 12 Q. B. D. 436.
Ex parte Hubbard (1886) 17 Q. B. D., at p. 696, *per* Lord Esher, M. R.
Re Morritt (1886) 18 Q. B. D., at pp. 232–4.

[As a general rule, securities on chattels in which the possession passes to the creditor are effected by way of pledge, which does not transfer ownership, but only possession (see *post*, §§ 1580–1589). But if it were held that a delivery of chattels by way of security

could not transfer the ownership, then the curious result would follow, that an assignment where the assignor retained possession would (if the requirements of the Bills of Sale Acts were complied with) be more efficacious than one where he did not. In *Flory* v. *Denny* (1852) 7 Exch. 581, it was held that a mortgage of chattels might be made by unsealed writing, without delivery. Such a transaction would now be void under the Bills of Sale Act, 1882.]

Security bill of sale

1573. A bill of sale, given by way of security for the payment of money,[a] will, if executed on or after 1st November, 1882,[b] be void (wholly or partially) unless it complies with the requirements of the Bills of Sale Acts, 1878 and 1882.[c]

(a) Bills of Sale Act, 1882, s. 3. For the definition of 'bill of sale' see Act of 1878, s. 4; and *ante*, § 1560.

[Whether a 'hire-purchase agreement' is a bill of sale for the purposes of the Acts, depends upon whether it is a genuine transaction under which the property in the goods remains in the vendor, or a security for money effected by means of an assignment to the creditor followed by a pretended hiring to the debtor (*McEntire* v. *Crowley Bros.* [1895] A. C. 457; *Maas* v. *Pepper* [1905] A. C. 102).]

(b) Act of 1882, s. 2.
(c) *Ibid.*, ss. 4, 8, 9.

[These requirements are set out in the Bills of Sale Acts, 1878 and 1882, and are (i) an inventory of the chattels comprised in the bill, (ii) attestation of the bill by a credible witness not a party, (iii) registration within seven days of execution, or, if executed abroad, of arrival in England in due course, (iv) true statement of the consideration, (v) form specified in the Schedule to the Act. Failure to observe the first requirement (s. 4) makes the bill, as to any chattels not specifically described, void 'except as against the grantor'; the omission of any of the requirements (ii) (iii) and (iv), makes the transaction totally void as a bill of sale, though, probably, not as a personal loan (*Heseltine* v. *Simmons* [1892] 2 Q. B.

547); the omission of requirement (v), which, however, only applies where the money secured is to be paid *by the grantor*, avoids the bill altogether, and no action can be brought on the transaction which it embodies (*Smith* v. *Whiteman* [1909] 2 K. B. 437; *Hall* v. *Whiteman* [1912] 1 K. B. 683.) It should be carefully noted that, owing to the difference in wording between s. 8 of the Act of 1878 and s. 8 of the Act of 1882, and to the operation of s. 4 of the Act of 1878, the earlier statute applies only to (absolute) bills where the grantor retains possession, while the later applies to all (security) bills where possession does not pass to the grantee. The object of registration (which, though the Act of 1882 does not expressly require it, must be repeated every five years (*Fenton* v. *Blythe* (1890) 25 Q. B. D. 417)) is, of course, to secure publicity; and any one may inspect and take copies of registered bills of sale, on payment of fees (Act of 1878, s. 16; 1882, s. 16). The provisions of the Act of 1882 are expressly (s. 17) excluded from affecting debentures issued by incorporated companies; and, probably, they do not apply to any securities given by a company which require registration under s. 93 of the Companies (Consolidation) Act, 1908 (*Re Standard Manfg. Co.* [1891] 1 Ch., at p. 648, *per* Bowen, L. J.; *Richards* v. *Mayor of Kidderminster* [1896] 2 Ch. 212).]

Future-acquired chattels

1574. A bill of sale given by way of security for the payment of money is void, except as against the grantor, in respect of any chattels described in it of which, at the time of the execution of the bill of sale,[a] the grantor was not the owner.[b]

(a) There are exceptions for (i) growing crops, and (ii) fixtures, plant, or trade machinery substituted for those specified in the bill of sale (s. 6).

(b) Bills of Sale Act, 1882, s. 5.

[It is sufficient if the grantor is equitable owner of the chattels, e. g. a man who has already given a bill of sale of his goods can give a second, by virtue of his right of redemption (*Thomas* v. *Searles* [1891] 2 Q. B. D. 408). On the other hand, a bare legal owner can also give a valid bill of sale by way of security (*Re Sarl* [1892] 2 Q. B. 591).]

Bills for less than £30

1575. Every bill of sale given by way of security in consideration of any sum under thirty pounds is void.

Bills of Sale Act, 1882, s. 12.

Subject to distress for taxes and parochial rates

1576. A bill of sale given by way of security does not protect the chattels comprised in it from distress for taxes, or poor or other parochial rates;[a] nor does it afford any protection against a distress for rent.[b]

(a) *Ibid.*, s. 14.

[Apparently it protects against general district rates, which are not parochial rates (*Richards* v. *Mayor of Kidderminster* [1896] 2 Ch. 212), and against an execution on a judgment for rates of any kind (*Wimbledon Local Board* v. *Underwood* [1892] 1 Q. B. 836).]

(b) Law of Distress Amendment Act, 1908, s. 4 (1).

And to 'order and disposition' clause

1577. A bill of sale to which the Bills of Sale Act, 1882, applies, will not, even though duly registered, prevent the chattels comprised therein being in the possession, order, or disposition of the grantor, in his trade or business, for the purposes of the Bankruptcy Act, 1883, s. 44 (iii).

Bills of Sale Act, 1882, s. 15.
Bankruptcy Act, 1883, s. 149 (2).
Swift v. *Pannell* (1883) 24 Ch. D. 210.
Re Ginger [1897] 2 K. B. 461.

[This is believed to be the effect of s. 15 of the amending Act, which repeals s. 20 of the Act of 1878, so far as security bills only are concerned (Act of 1882, s. 3). It is, perhaps, unnecessary to

call attention to the endless difficulties raised by the wording of the Act of 1882. It may be pointed out, however, that, if the grantee of a security bill has the right to seize the chattels comprised in it, and can do so before he has received notice of an act of bankruptcy on the part of the grantor, and before a receiving order has been made, the chattels will cease to be in the 'apparent possession' of the bankrupt (Bankruptcy Act, 1883, s. 49 (d); *Re Wright* (1876) 3 Ch. D. 70 (on the Act of 1869)).]

Causes of seizure

1578. The grantee of a bill of sale given by way of security may not seize or take possession of the chattels comprised therein for any other than (one of) the following causes: —

(i) default in payment of the sum or sums of money secured, at the time therein provided for payment, or in performance of any agreement in the bill necessary for maintaining the security;

(ii) bankruptcy of the grantor, or distress on the goods for rent, rates, or taxes;

(iii) fraudulent removal of any of the goods 'from the premises';

(iv) failure by the grantor, without reasonable excuse, upon demand in writing by the grantee, to produce his last receipts for rents, rates, and taxes;

(v) levy of execution against the goods of the grantor under any judgment at law.

And, even when the chattels have been rightfully seized, they may not be sold, or removed from the

premises on which they were seized, until after the expiration of five clear days from the seizure; during which time the grantor may apply to the Court or a Judge in Chambers to restrain the removal or sale.

Bills of Sale Act, 1882, ss. 7, 13.

[The prohibition against removal or sale within five days applies to all security bills, whenever executed (s. 13). Default in payment of interest secured by the bill of sale is a ground of seizure (*Ex parte Ellis* [1898] 2 Q. B. 79).]

Registration not constructive notice

1579. A purchaser for value of the legal property in chattels corporeal, an equitable interest in which has previously been created in favour of another person by a registered bill of sale, is not, by the mere fact of registration, deemed to have constructive notice of the existence of the equitable interest.

Joseph v. *Lyons* (1884) 15 Q. B. D. 280.
Hallas v. *Robinson* (1884) *ibid.*, 288.

Pledge

1580. A pledge of chattels corporeal is effected by delivery of such chattels to, or to a person on behalf of, the creditor ('pledgee'), without intent to pass the ownership in the chattels, but with intent that such chattels shall be a security for the payment of money.

Meyerstein v. *Barber* (1866) L. R. 2 C. P., at p. 51, *per* Willes, J.
Hilton v. *Tucker* (1888) 39 Ch. D. 669.
Grigg v. *National Guardian Insurance Co.* [1891] 3 Ch. 206.

[Though often spoken of as a 'special property,' the interest of the pledgee is really only possessory (*Attenborough* v. *Solomon* [1913] A. C., at p. 84, *per* Haldane, C.).]

Pledge by deposit of bill of lading

1581. A pledge of goods in course of transit by sea can be effected by a deposit of the bill of lading with the pledgee with that intent. Whether such deposit is intended merely as a pledge, or as a transfer of the ownership of the goods, is a question of fact in each case.

Sewell v. *Burdick* (1884) L. R. 10 App. Ca. 74.

Pledgee's right of sale

1582. A mortgagee or a pledgee of chattels corporeal has, unless the sum secured has been paid or tendered, a right to sell the chattels at any time after the day fixed for payment,[a] or, if no day has been fixed, at any time after reasonable notice requiring payment has been given to the mortgagor or pledgor.[b] A mortgagee (but not a pledgee) has also a right of foreclosure (*ante*, § 1402 (iii)) in similar circumstances.[c]

(a) *Dickinson* v. *Capper* (1616) 1 Rolle Rep. 215.
Pigot v. *Cubley* (1864) 15 C. B. N. S. 701.
Donald v. *Suckling* (1866) L. R. 1 Q. B., at p. 604, *per* Mellor, J.

(b) *Ex parte Hubbard* (1886) 17 Q. B. D., at p. 698, *per* Bowen, L. J.
Re Morritt (1886) 18 Q. B. D., at pp. 232–4, *per Curiam*.
Deverges v. *Sandeman* [1902] 1 Ch., at pp. 592, 3, *per* Stirling, L. J.
Stubbs v. *Slater* [1910] 1 Ch., at p. 639, *per* Cozens-Hardy, M. R.

[Of course, in either case, any surplus realized by the sale goes to the mortgagor or pledgor (*Ponsolle* v. *Webber* [1908] 1 Ch. 254).]

(c) *Carter* v. *Wake* (1877) 4 Ch. D. 605.
Harrold v. *Plenty* [1901] 2 Ch. 314.

[These were both cases of choses in action. But the language of the Court applies equally to chattels corporeal.]

Transfer of security

1583. A mortgagee or pledgee of chattels corporeal is entitled, even before the day for payment of the money secured has arrived, to dispose of his own interest therein, either absolutely or by way of security, subject to the rights of the mortgagor or pledgor.[a] But, until a lawful sale for the purpose of realizing his security has been effected by the pledgee, the pledgor has (subject to § 1588) a right of redemption.[b]

(a) *Donald* v. *Suckling* (1866) L. R. 1 Q. B. 585.
France v. *Clark* (1883) 22 Ch. D. 257.

[If the mortgagee or pledgee attempts to dispose of the chattels absolutely before his right to do so accrues, he will be guilty of conversion (*ante*, Bk. II, Pt. III, Sect. III, Tit. II); though, probably, he will be allowed to set off his debt against the value of the chattels (*Johnson* v. *Stear* (1863) 15 C. B. N. S. 330).]

(b) *Ratcliff* v. *Davis* (1610) Yelv. 178.
Kemp v. *Westbrook* (1749) 1 Ves. Sen. 278.

[According to Lord Hardwicke in the latter case, no lapse of time bars the claim to redeem a pledge. In both cases it was said that the right to redeem is restricted to the lifetime of the pledgor, and does not pass to his executor. *Sed quære.*]

Liabilities of pledgee

1584. A pledgee is not liable for damage to the chattels not arising from his own negligence;[a] and he may add to the debt all expenses reasonably incurred by him in preserving the chattels from depreciation or loss.[b] But a pledgee may not make any use of the chattels pledged; unless such user would not be prejudicial to the chattels.[c]

(a) *Ratcliff* v. *Davis* (1610) Yelv. 178; 1 Bulstr. 29.
Coggs v. *Bernard* (1704) 2 Ld. Raym., at p. 917, *per* Holt, C. J.

[If, however, the pledgee detains the chattels after payment or tender of the amount due, he becomes absolutely liable (*Coggs* v. *Bernard*, *ubi sup.*).]

(b) Lord Holt, in the case of *Coggs* v. *Bernard*, *ubi sup.*, limits the compensation for expenses to user of the chattels. *Sed quære.*
(c) *Mores* v. *Conham* (1609) Owen, at p. 124, *per Curiam.* *Coggs* v. *Bernard*, *ubi sup.*

[Sometimes the qualification is stated more cautiously as 'unless such user would be beneficial'; and both the authorities quoted state that a pledgee who uses the pledge is absolutely responsible for its safety.]

Jus tertii of pledgee

1585. Nothwithstanding § 888 (Bk. II, Pt. III, Sect. III, Tit. III, *ante*), a pledgee may set up a *jus tertii* in a claim against him by the pledgor for a return of the goods.

Cheeseman v. *Exall* (1851) 6 Exch. 341.
Singer Manfg. Co. v. *Clark* (1879) 5 Exch. D. 37.

Cheeseman v. *Exall* may, however, be explained as a case of fraud. Of course, a pledgor cannot (in the absence of special circumstances) give any better title to the pledgee than he himself has (*Hoare* v. *Parker* (1788) 2 T. R. 376; *Attenborough* v. *Solomon* [1913] A. C. 76).]

Alienation by pledgor

1586. Notwithstanding the existence of the pledge, the pledgor may alienate the chattel pledged; and the alienee will be entitled to redeem the chattel on payment of the amount due on the pledge.

Franklin v. *Neate* (1844) 13 M. & W. 481.

Not in 'order and

1587. Pledges in the possession of a bankrupt pledgee at the commencement of his bankruptcy do

disposition' of pledgee

not pass to his trustee;[a] and pledges are not liable to be distrained for rent owing by a pawnbroker on whose premises they are situated.[b]

(a) There seems to be no actual decision on pledgees. But it is submitted that, if the pledgee were a pawnbroker, there would be no reputation of ownership (see expressions of Lord Selborne, C., in *Ex parte Watkins* (1873) L. R. 8 Ch. App. 521), while, if he were not, the pledge would not be 'in the order and disposition of the bankrupt in his trade or business.' Of course, the rights of the pledgee pass to his trustee in bankruptcy.

(b) *Swire* v. *Leach* (1865) 18 C. B. N. S. 479.

[On the other hand, the sheriff under a Fi. Fa. may sell the interest of the pawnbroker, and (*semble*) of any pledgee (*Re Rollason* (1887) 34 Ch. D. 495).]

Pawnbrokers Act

1588. Pledges given on loans by pawnbrokers of sums of forty shillings or under, are subject to the provisions of the Pawnbrokers Act, 1872;[a] pledges given on loans by pawnbrokers above forty shillings, but not above ten pounds, are also subject to the provisions of the same statute, unless a special contract is made between the parties in manner provided by such statute.[b]

(a) Pawnbrokers Act, 1872, s. 10 (1).

(b) *Ibid.*, ss. 10 (1), 24.

[As between the parties, the chief differences between the statutory and the common law pledge are that the former (1) must be accompanied by a pawn-ticket, the production of which is (except in special cases) necessary and sufficient authority for delivery up of the pledge on redemption, (2) is redeemable within a year and seven days, (3) if for not more then ten shillings becomes the absolute property of the pawnbroker if not redeemed within that time, (4) if for ten shillings or upwards remains redeemable until sale, and can only be sold by public auction under statutory regulations, (5) permits of only a limited rate of profit being charged by the pawnbroker (*ibid.*, ss. 14–19).]

Return of pledge for special purpose

1589. The fact that a pledgee delivers the chattels pledged to the pledgor for a special purpose, does not necessarily deprive the pledgee of his interest in the chattels; even when the special purpose is to effect a sale of the chattels.

North Western Bank v. *Poynter* [1895] A. C. 56.

[Needless to say, the pledgee would not be able to set up his right to the goods against the purchaser who had bought at a sale authorized by the pledgee. But the pledgee's right would avail against the general creditors of the pledgor.]

Tacking, Consolidation, Clogging

1590. (*Semble*) The doctrines of Tacking [a] (*ante*, Sect. IV, Tit. II, § 1400), Consolidation [b] (*ibid.*, § 1417), and Clogging the Equity [c] (*ibid.*, § 1415), apply to mortgages of chattels corporeal. But the doctrine of Consolidation must not be used to defeat the policy of the Bills of Sale Acts.[d]

(a) *Re Salmon* [1903] 1 K. B. 147.
(b) *Spalding* v. *Thompson* (1858) 26 Beav. 637.
Cracknall v. *Janson* (1879) 11 Ch. D. 1.
(c) *Bradley* v. *Carritt* [1903] A. C. 253.
Jarrah Co. v. *Samuel* [1904] A. C. 323.

[The authorities are very scanty; and the cases quoted were all concerned with choses in action. But there seems to be no difference in principle between the two kinds of securities.]

(d) *Chesworth* v. *Hunt* (1880) 5 C. P. D. 266.

[It is fairly clear, that these doctrines have no general application to pledges; because the right of the pledgor to redeem is not merely equitable, but legal (*Crickmore* v. *Freeston* (1870) 40 L. J. Ch. 137). The Pawnbrokers Act, 1872, s. 22, seems, however, to apply the principle of Consolidation, to a limited extent, to pledges.]

Liens

1591. A lien on chattels corporeal consists of the right to retain possession of such chattels until a certain claim or certain claims of the possessor is or are discharged. For the purposes of this Title, the person claiming to retain possession is called the 'creditor,' and the person entitled, subject to the lien, to possession of the chattels, is called the 'debtor'; whether or not the relation of debtor and creditor legally exists between such persons.

Jackson v. *Cumming* (1839) 5 M. & W. 342.
Shaw v. *Neale* (1858) 6 H. L. C., at p. 601, *per* Lord Chelmsford, L. C.

[Liens independent of possession may exist in respect of goods, by virtue of maritime law; but these, as being part of Commercial Law, are not dealt with in this work. The liens of trustees will be treated in a later Section. For liens on land, see *ante*, Sect. IV, Tit. III, § 1426. There can be no equitable lien on goods, independently of possession, analogous to the unpaid vendor's (or purchaser's) lien on land (*Lloyds' Bank* v. *Swiss Bankverein* (1912) 107 L. T. 309).]

'General' and 'particular' liens

1592. Where a creditor is entitled to retain any chattels of the debtor in his possession to satisfy all the liabilities towards him of the debtor, or all the liabilities of a certain kind, such right is called a 'general lien.' [(a)] Where the creditor's right is only to detain a specific chattel or chattels to satisfy liabilities arising in connection with such chattel or chattels, his right is said to be a 'particular lien.' [(b)] Both general and particular liens may

arise (i) by operation of law,[c] (ii) by agreement of the parties.[d]

(a) *Frith* v. *Forbes* (1862) 4 De G. F. & J., at p. 419, *per* Knight Bruce, L. J., at p. 420, *per* Turner, L. J.
(b) *Anglo-Italian Bank* v. *Davies* (1878) 9 Ch. D., at p. 289.
(c) See *post*, §§ 1593, 1595.
(d) *Gladstone* v. *Birley* (1817) 2 Mer., at p. 404, *per* Grant, M. R. (general lien).
Castellain v. *Thompson* (1862) 13 C. B. N. S. 105 (particular lien).

General liens

1593. A general lien arises by operation of law in the cases of innkeepers,[a] factors,[b] wharfingers,[c] packers,[d] bankers,[e] stock-brokers,[f] and solicitors,[g] who are entitled to retain possession of all chattels coming to their hands as such, until all their claims against the owners thereof in such capacities are satisfied. Any similar lien may be claimed by virtue of special custom clearly proved.[h]

(a) *Mulliner* v. *Florence* (1878) 3 Q. B. D. 484. (The lien of the innkeeper is not confined to chattels belonging to the guest. See *ante*, Bk. II, Pt. II, Sect. VI, § 555).
Angus v. *McLachlan* (1883) 23 Ch. D. 330.
(b) *Kinloch* v. *Craig* (1789) 3 T. R., at p. 122, *per* Ashurst, J.
Cowell v. *Simpson* (1805) 16 Ves., at p. 280, *per* Lord Eldon, C.

[This lien is sometimes called a 'consignees' lien, e. g. in *Frith* v. *Forbes*, *ubi sup.* It is important to note that, if a factor receives goods knowing that they have been made subject to a charge in favour of a third party, he cannot set up his general lien against such charge (*ibid.*).]

(c) *Rex* v. *Humphery* (1825) McCle. & Y. 173. (This case shows that the lien prevails against the Crown claiming the goods by extent.) § 451 (*ante*) must be amended in this sense.

[But the wharfinger's lien does not cover his charges for labourage or warehousing; unless there is a special custom to that effect

binding the owner of the goods (*Holderness* v. *Collinson* (1827) 7 B. & C. 212). And where, by custom, the importer has a certain period within which to pay the wharfage charges, during which time he may remove the goods, a person who purchases during such period is protected against the wharfinger's lien; even though the goods are lying at the wharf when the period expires (*Crawshay* v. *Homfray* (1820) 4 B. & Ald. 52).]

(d) *Ex parte Deeze* (1748) 1 Atk. 228.
Re Witt (1876) 2 Ch. D. 489.
(e) *Davis* v. *Bowsher* (1794) 5 T. R. 488.
Brandao v. *Barnett* (1846) 12 Cl. & F. 787.

[The latter case shows that the lien does not extend to chattels delivered to the bankers for a special purpose, inconsistent with the right. Nor does it extend to securities in a box the contents of which have not been put into the possession of the bankers.]

(f) *Jones* v. *Peppercorne* (1858) John. 430.
London & Globe Finance Corpn. [1902] 2 Ch. 416.
Hope v. *Glendinning* [1911] A. C. 419.

[The last was a Scottish case; but the laws of England and Scotland on this point are stated to be the same, and the two earlier cases are expressly approved.]

(g) *Cowell* v. *Simpson* (1805) 16 Ves. 275.
Re Taylor, Stileman, & Co. [1891] 1 Ch., at p. 596, *per* Lindley, L. J.
Re Morris [1908] 1 K. B. 473.

[The lien, however, only extends to the professional charges of the solicitor, not to ordinary advances or loans (*Re Taylor, Stileman, & Co., ubi sup.*); and it is restricted to the client's interest in the subject-matter of documents in respect of which it is claimed (*Re Llewellin* [1891] 3 Ch. 145). But all who take under the client are bound by it, e. g. *cestuis que trustent* whose trustee's deeds are subject to a lien by the trustee's solicitors acting as such (*Re Dee Estates* [1911] 2 Ch. 85).]

(h) *Bock* v. *Gorrissen* (1860) 2 De G. F. & J., at p. 443, *per* Lord Campbell, C. The cases show, however, that the Court does not favour such a custom (*Rushforth* v. *Hadfield* (1805) 6 East, 518).

[Some text-books state that dyers are entitled to a general lien; and *Savill* v. *Burchard* (1801) 4 Esp. 53 is in favour of that view.

But the balance of authority seems to be against it; though the claim may, doubtless, be established by proof of the existence of a special custom affecting a particular locality. (*Green* v. *Farmer* (1768) 4 Burr. 2214; *Close* v. *Waterhouse* (1801) 6 East, 523 n.; *Plaice* v. *Allcock* (1866) 4 F. & F. 1074).]

Carriers, warehousemen, and agents

1594. Apart from statute, agreement, or special custom, neither a common carrier,(a) nor a public warehouseman,(b) nor an agent,(c) has a general lien on chattels corporeal delivered to him as such.

(a) *Rushforth* v. *Hadfield* (1805) 7 East, 224.
Wright v. *Snell* (1822) 5 B. & Ald. 350.

[A railway company has a general lien for tolls under the Railways Clauses Consolidation Act, 1845, s. 97.]

(b) *Leuckhart* v. *Cooper* (1836) 3 Bing. N. C. 99.

[In *Hill* v. *London Central Markets* (1910) 102 L. T. 715, it seems to have been admitted, on grounds not stated, that the defendants, warehousemen, had a general lien on the goods stored with them. But this may have been by virtue of special custom or agreement.]

(c) *Bock* v. *Gorrissen, ubi sup.*, at p. 443, *per* Lord Campbell, C. (? as to factors).

Particular lien

1595. A particular lien arises by operation of law, for the reasonable charges of the creditor, when he has expended labour and skill, at the request of the debtor,(a) upon chattels bailed to him.(b) (*Semble*) Such lien will only prevail against the interest of the person requesting the expen-

diture of the services.[c] There is no lien for voluntary services.[d]

[The seller of goods has, in respect of the unpaid purchase-money, the lien specified in Bk. II, Pt. II, Sect. I, Tit. I, §§ 398–401, *ante*.]

(a) *Oppenheim* v. *Russell* (1802) 3 Bos. & P., at p. 47, *per* Alvanley, C. J.
Chase v. *Westmore* (1816) 5 M. & S. 180.
Franklin v. *Hosier* (1821) 4 B. & Ald. 341.
Scarfe v. *Morgan* (1838) 4 M. & W. 270.

(b) It is essential that the creditor shall have a possession which cannot be interrupted at the will of the debtor (*Forth* v. *Simpson* (1849) 13 Q. B. 680). Thus, the agister of cattle (*Chapman* v. *Allen* (1632) Cro. Car. 271; *Jackson* v. *Cummins* (1839) 5 M. & W. 342) and the livery stable keeper (*Judson* v. *Etheridge* (1833) 1 Cr. & M. 743) have no lien for their charges as such; though the reason is sometimes alleged to be that they do not render services which improve the value of the chattels. And the lien cannot be claimed by a person who had merely paid the workman. Thus, the captain of a ship who pays for repairs done in England has no lien for his outlay (*Wilkins* v. *Carmichael* (1779) 1 Doug. 101).

[The authorities extend to giving a marine insurance broker a lien on the policies effected by him, to the extent of premiums which he has paid (*Fisher* v. *Smith* (1878) L. R. 4 App. Ca. 1).]

(c) *Solly* v. *Rathbone* (1814) 2 M. & S. 298.
Buxton v. *Baughan* (1834) 6 C. & P. 674.

[There may be an exception where the creditor was compellable to receive the goods, e. g. a common carrier (*Exeter Carrier's Case* (n. d.) quoted by Holt, C. J., in *Yorke* v. *Grenaugh* (1703) 2 Ld. Raymond, at p. 867).]

(d) *Nicholson* v. *Chapman* (1793) 2 H. Bl. 254.

Express contract not inconsistent

1596. The fact that the chattels were delivered to or acquired by the creditor under an express contract with regard to remuneration, does not prevent the acquisition of a lien by operation of law; if the

contract contains nothing inconsistent with such lien.

Chase v. *Westmore, ubi sup.*
Scarfe v. *Morgan, ubi sup.*
Fisher v. *Smith* (1880) L. R. 4 App. Ca. 1.

Lien by agreement

1597. Where the lien arises by agreement, the rights of the creditor are limited to the interest belonging to or capable of being disposed of by the bailor of the chattel at the time when the liability was incurred, or subsequently acquired or disposable by the bailor during the continuance of the liability.[a] But the lien, to the extent to which it was valid against the bailor, is valid against all persons claiming through him, including his trustee in bankruptcy.[b]

(a) *Wright* v. *Snell* (1822) 5 B. & Ald. 350.
Buxton v. *Baughan* (1834) 6 C. P. 674, *per* Alderson, B.
Barry v. *Longmore* (1840) 12 A. & E. 639.
Ex parte Roy (1877) 7 Ch. D. 70.
(b) *Lempriere* v. *Pasley* (1788) 2 T. R. 485.
Gurnell v. *Gardner* (1863) 4 Giff. 627.
Jowitt v. *Union Cold Storage Co.* (1913) XXIX T. L. R. 477.

Unlawful possession

1598. A person cannot by unlawfully taking possession of chattels acquire a lien upon them.

Lempriere v. *Pasley, ubi sup.*, at p. 490, *per* Ashurst, J.

[This was a case in which the person claiming the lien had paid freight on goods of which he unlawfully obtained delivery. *Semble*, the rule would be the same if the claim arose in respect of labour expended after obtaining unlawful possession.]

No power of sale

1599. Generally speaking, the person entitled to the benefit of a lien has no power of sale of the chattels.

Thames Ironworks Co. v. *Patent Derrick Co.* (1860) 1 J. & H. 93.

But, by statute: —

(i) an innkeeper may sell chattels which have been brought on to his premises by a guest, in manner, and subject to the conditions specified in § 557, *ante*.

Bk. II, Pt. II, Sect. VI.

(ii) a railway company may, after demand, sell, to satisfy tolls due to it for the use of the railway by the owner of such chattels, any chattels in respect of which such tolls are due, or any other chattels within the premises of the company belonging to the same owner;

Railways Clauses Consolidation Act, 1845, s. 97.

(iii) an unpaid seller of goods has the right to resell the goods under the conditions specified in § 406, *ante*.

Bk. II, Pt. II, Sect. I, Tit. I.

No charge for safe custody

1600. A creditor who detains chattels for the purpose of enforcing his lien for skill and labour, is not, in the absence of special contract, express or implied,

entitled to add to his lien a charge for safe keeping of such chattels.

Somes v. *B. E. Shipping Co.* (1860) 8 H. L. C. 338.

Liabilities of lienor

1601. The liabilities of the creditor with regard to the safe custody of the chattels upon which he claims a lien depend upon the nature of the contract under which they are in his possession.

Angus v. *McLachlan* (1883) 23 Ch. D. 330.

[For particulars of these various contracts, see *ante*, Bk. II, Pt. II, Sects. IV, VI, and VII.]

Extinction of lien

1602. A lien is extinguished by (i) waiver of the lien,[a] (ii) payment or tender, by the owner of the chattels or person entitled to the possession of them, of the amount due under the lien,[b] (iii) conversion of the chattels to the creditor's use,[c] (iv) voluntary parting with possession of the chattels.[d]

(a) *Morley* v. *Hay* (1828) 7 L. J. O. S. 104.
Weeks v. *Goode* (1859) 6 C. B. N. S. 367.
(b) *Jones* v. *Tarleton* (1842) 9 M. & W. 675.
(c) *Jacobs* v. *Latour* (1828) 5 Bing. 130. (In this case the creditor procured the chattels to be taken in execution on a judgment recovered by himself against the debtor. It might, perhaps, also be treated as a case of waiver.)
Jones v. *Tarleton*, *ubi sup.*
Kerford v. *Mondel* (1859) 28 L. J. Ex. 303.
(d) *Sweet* v. *Pym* (1800) 1 East, 4.
Hill v. *London Central Markets* (1910) 10 L. T. 715.

[A mere demand of a larger amount than is due to the creditor does not destroy the lien (*Scarfe* v. *Morgan* (1838) 4 M. & W. 270).

But a refusal to give up unless the whole of an excessive demand is paid is a conversion, and does (*Jones* v. *Tarleton* (1842 (9 M. & W. 675).]

Evidence of waiver

1603. The taking of other security for the creditor's claim,[a] or the giving of credit for the claim,[b] if inconsistent with the continuance of the lien, is evidence of waiver of the lien.

(a) *Wilkins* v. *Carmichael* (1779) 1 Doug., at p. 104, *per* Lord Mansfield, C. J.
Cowell v. *Simpson* (1809) 16 Ves. 275.
Hewison v. *Guthrie* (1836) 2 Bing. N. C. 755.

[It was held, by Kay, J., in *Angus* v. *McLachlan* (1883) 23 Ch. D. 330, that the rule only applied where the taking of new security was inconsistent with retaining the lien; in other words, was an implied waiver. And this view seems to have been followed in *Re Morris* [1908] 1 K. B. 473.]

(b) *Raitt* v. *Mitchell* (1815) 4 Camp., at pp. 149–150.

SECTION XI

INVOLUNTARY ALIENATION OF CHATTELS CORPOREAL

Bankruptcy

1604. Upon an adjudication in bankruptcy there passes to the trustee in bankruptcy the ownership of :[a] —

(i) all such chattels corporeal as were the property of the bankrupt at the commencement of the bankruptcy ;[b]

(ii) all such chattels corporeal as, at the commencement of the bankruptcy, were in the possession, order, or disposition of the bankrupt, in his trade or business, with the consent of the true owner, under such circumstances that the bankrupt was the reputed owner thereof.[c]

And such ownership passes from trustee to trustee (including the official receiver when acting as trustee) on appointment, without any express conveyance.[d]

(a) Bankruptcy Act, 1883, s. 54 (1) (2).
(b) *Ibid.*, s. 44 (i). (For the meaning of this expression, see *ante*, Sect. V. § 1453, n. (d).)
(c) *Ibid.*, s. 44 (iii).
(d) *Ibid.*, s. 54 (3).

[From the operation of the rule in the text must be excepted (a) property held by the bankrupt on trust for any other person, (b) tools of his trade and wearing apparel, together not exceeding £20 in value (s. 44 (1) (2)).]

Subsequently acquired chattels

1605. Subject to § 70 (Bk. I, Sect. III, Tit. I, *ante*), the ownership of chattels corporeal acquired by, or devolving on, the bankrupt before his discharge, also passes to the successive trustees in his bankruptcy, in like manner.

Bankruptcy Act, 1883, s. 44 (i)

Disclaimer

1606. A trustee in bankruptcy may disclaim, in manner and subject to the conditions specified in Sect. V, §§ 1454–1456, *ante*, any chattels corporeal forming part of the (former) property of the bankrupt, which are unsaleable, or not readily saleable, by reason of their binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money; and such disclaimer will operate in manner expressed in §§ 1454–1456 aforesaid.

Ibid., s. 55.

[Examples of chattels corporeal disclaimable on the above grounds would be (1) goods to which a liability for freight attached, (2) goods pledged for more than their value. But there do not appear to be any decisions with regard to chattels corporeal; though there are many with regard to leases and choses in action.]

Execution

1607. Subject to certain exceptions,[a] any of the chattels corporeal of a judgment debtor, wherever situate within the jurisdiction,[b] may be seized by the sheriff or County Court bailiff, to satisfy a judg-

ment or order of the Court for payment of money.[c] But the property in the chattels is not divested from the debtor until a proper sale has been effected by the sheriff or bailiff.[d]

(a) The most important exceptions are (1) the wearing apparel and bedding of the debtor or his family, and his tools or implements of trade, up to the value of five pounds (Small Debts Act, 1845, s. 8; County Courts Act, 1888, s. 147), and (2) the rolling stock of a railway company (Railway Companies Act, 1867, s. 4).

(b) If goods have been removed to the house of a third person to evade execution, the sheriff may even (after request to open) break into such house to seize the goods. Otherwise the sheriff may not break into a house at the suit of a private person (*Semayne's Case* (1605) 5 Rep. 91 a). If the sheriff enters the house of a stranger on mere suspicion that the debtor's goods are there, he acts at his own risk. But he is justified in entering any house where the debtor's goods might reasonably be expected to be (e. g. that of the debtor's executor), whether in fact the goods are there, or not (*Cooke* v. *Birt* (1814) 5 Taunt. 765).

(c) Judgments Act, 1838, s. 12. (This enactment extended the sheriff's powers to money, bank-notes, and negotiable instruments, which were not seizable at the common law under a Fi. Fa.). County Courts Act, 1888, s. 147.

(d) *Giles* v. *Grover* (1832) 6 Bligh, N. S. 277.

[The writ of Fi. Fa. now only binds the debtor's chattels from the time at which it is lodged with the sheriff or bailiff for execution; and a *bonâ fide* acquirer for value of the chattels, after the lodging of the writ, but before actual seizure, is protected if he had no notice of the lodging of the writ (Sale of Goods Act, 1893, s. 26). Generally speaking, chattels in the hands of the sheriff or bailiff under a writ of execution cannot be distrained for rent (*Wharton* v. *Taylor* (1848) 12 Q. B., at p. 677, *per* Patteson, J.); though there is an exception for growing crops if there is no other sufficient distress (Landlord and Tenant Act, 1851, s. 2). And an execution creditor is not entitled to the benefit of his execution, if he has notice of an act of bankruptcy committed by the debtor before completion of the execution by seizure and sale (Bankruptcy Act, 1883, s. 45). An ingenious evasion of similar provisions in earlier bankruptcy legislation has been stopped by the section abolishing the application of the writ of Elegit (*ante*, Sect. V, § 1457, n.) to goods (*ibid.*, s. 146). The Crown has prerogative remedies against

the goods of its debtors and their debtors, without proceeding to judgment, similar to those which it enjoys against the lands of such persons (*ante*, Sect. V, § 1457, n., and *Pridgeon* v. *Mellor* (1912) XXVIII T. L. R. 261).]

Distress for rent

1608. *Primâ facie*, but subject to various exemptions,[a] the landlord of any premises may seize and sell, under a distress for rent,[b] any chattels corporeal found upon the premises; whether they are the property of the tenant, or not.[c] But the property in the chattels is not divested, until a proper sale to a stranger has been effected by or on behalf of the distrainor.[d]

(a) The number of exemptions from distress is considerable; and the subject is too complicated to be described in detail. Briefly, the absolute exemptions are (i) animals *feræ naturæ* (Co. Litt. 47 a), (ii) chattels in actual use (*Simpson* v. *Hartopp* (1744) Willes, 512), (iii) chattels delivered by the owner to be dealt with by the occupier of the premises in the way of his public trade (*ibid.*), (iv) chattels in the custody of the law, e. g. already seized under an execution or distress (*Wharton* v. *Naylor* (1848) 12 Q. B., at p. 677, *per* Patteson, J.) — but the landlord can insist on arrears of rent not exceeding one year being paid before the chattels are removed under an execution (8 Anne (1709) c. 18 (14) s. 1), (v) perishable goods (*Morley* v. *Pincombe* (1848) 2 Exch 101), (vi) loose money (because it cannot be identified), (vii) fixtures (*Darby* v. *Harris* (1841) 1 Q. B. 895; *Crossley Bros.* v. *Lee* [1908] 1 K. B. 86), (viii) chattels of the Crown on land occupied by a subject (*Sec. of State* v. *Wynne* [1905] 2 K. B. 845), (ix) machinery of a stranger lent under an agreement to the tenant of an agricultural holding for purposes of his business, and live stock of a stranger on such holding solely for breeding purposes (Agricultural Holdings Act, 1908, s. 29 (4)), (x) wearing apparel and bedding protected from seizure in execution by s. 147 of the County Courts Act, 1888 (*ante*, § 1607, n. (a)) (Law of Distress Amendment Act, 1888, s. 4), (xi) chattels of an under-tenant, lodger, or stranger having no interest in the premises, who conforms to the requirements of the Law of Distress Amendment Act,

1908 (ss. 1, 2). This last exemption seems practically to abolish the common law rule which made a stranger's goods liable to seizure under a distress for rent by the landlord of the premises where they might happen to be. Certain other classes of chattels are privileged *sub modo* — i. e. if there is other sufficient distress on the premises. On the other hand, the goods of a lessee fraudulently removed by him for the purpose of avoiding distress, may be seized by the landlord within thirty days; if in the meantime they have not been sold to a *bonâ fide* purchaser for value (Distress for Rent Act, 1737, ss. 1, 2).

(b) The power of sale did not exist at the common law; but was conferred by a statute of the year 1689 (2 W. & M. St. I, c. 5). The right of sale is subject to many rules and restrictions (see especially Law of Distress Amendment Act, 1888).

(c) At common law, the power to distrain belonged only to a reversioner, in respect of services. But, by the Landlord and Tenant Act, 1730, s. 5, it was extended to owners of rents seck, rents of assize, and chief rents (*ante*, Sect. I, Tit. IX, § 1287, n.), and by the Conveyancing Act, 1881, s. 44, to the owners of all annual sums charged on land which are twenty one days in arrear. But this last remedy is only given 'in so far as it might have been conferred by the instrument under which the annual sum arises.' As to the doubt raised by these words, see *ante*, Sect. I, Tit. IX, § 1289, n.).

(d) *King* v. *England* (1864) 4 B. & S. 782.
Moore v. *Singer Manfg. Co.* [1904] 1 K. B. 820.
Plasycoed Collieries Co. v. *Partridge* [1912] 2 K. B. 345.

SECTION XII

INCAPACITY TO HOLD AND ALIENATE CHATTELS CORPOREAL

Aliens

1609. An alien can acquire and alienate chattels corporeal, in the same manner and to the same extent as a British subject;[a] except that he cannot (unless a denizen) acquire any interest in a British ship (*ante*, Bk. I, § 72).[b]

(a) Naturalization Act, 1870, s. 2.
(b) Merchant Shipping Act, 1894, s. 1.

Minors

1610. A minor (being of an age to understand the nature of the transaction) can acquire and alienate chattels corporeal in the same manner as a person of full age;[a] except that he cannot, unless he is a soldier in actual military service, or a mariner or seaman at sea, make a valid testament.[b]

(a) *Taylor* v. *Johnston* (1882) 19 Ch. D. 602.
Valentine v. *Canali* (1889) 24 Q. B. D. 166.
(b) Wills Act (1837), ss. 7, 11.

[It is somewhat doubtful whether the doctrine of the text applies to acquisitions or alienations otherwise than by delivery of the chattels. In view of the importance of the subject, the amount of authority on it is astonishingly small.]

Minors and powers

1611. A minor may exercise, by act *inter vivos*, a power of disposition of chattels corporeal, if it was the

apparent intention of the donor or the power that it should be exerciseable by a minor.

Re Cardross' Settlement (1878) 7 Ch. D. 728.
Re D'Angibau (1880) 15 Ch. D. 228.

[But, presumably, any disposition of the minor's own interest would be revocable by him. (See remarks of Jessel, M. R., in *Re D'Angibau*, *ubi sup.*, at p. 234.) A minor, not being a soldier in actual military service or a mariner or seaman at sea, cannot exercise a power by testament (Wills Act, 1837, ss. 7, 11).]

Minors and marriage settlements

1612. A minor has the same statutory power of making, with the consent of the Court, a binding settlement on his or her marriage, of chattels corporeal as of land.

Bk. III, Sect. VII, Tit. I, § 1500, *ante*.

Married women

1613. A married woman may acquire and, subject to any restraint on anticipation (*ante*, Bk. I, § 105), dispose of chattels corporeal,[a] either in her own right or as trustee or personal representative,[b] and may exercise any power in respect of such chattels,[c] unless the donor of the power has expressly or by implication forbidden such exercise by a married woman.[d] And a married woman may release[e] or disclaim[f] any power; except in such a way as to remove a restraint on anticipation.

(a) Married Women's Property Act, 1882, s. 1.
(b) Married Women's Property Act, 1907, s. 1.
(c) *Wood* v. *Wood* (1870) L. R. 10 Eq. 220.
(d) *Horseman* v. *Abbey* (1819) 1 J. & W. 381.
Morris v. *Howes* (1845) 4 Ha. 599.

[The question generally arises on a doubt whether a power conferred on a married woman by her marriage settlement can be exercised by her during a subsequent coverture. *Semble:* such a question could still arise, notwithstanding the Married Women's Property Acts.]

(e) Conveyancing Act, 1881, s. 52 (1).
(f) Conveyancing Act, 1882, s. 6 (1).

Election by married woman

1614. A married woman may elect so as to bind her interests in chattels corporeal, to the same extent and subject to the same restrictions as in the case of land (*ante*, Sect. VII, Tit. II, § 1509).

Rutter v. *Maclean* (1799) 4 Ves. 531.
Cahill v. *Cahill* (1883) L. R. 8 App. Ca., at p. 426, *per* Lord Selborne, C.
Re Vardon's Trusts (1885) 31 Ch. D. 275.

[The chief restriction is, that she cannot so elect as to destroy a restraint on anticipation (*Re Vardon's Trusts*, *ubi sup.*). It was doubted in *Smith* v. *Lucas* (1881) 18 Ch. D., at p. 544, whether a married woman could elect so as to bind her future-acquired separate estate. But this doubt has, probably, since the passing of the Married Women's Property Act, 1893, s. 1, ceased to be of importance; though the exercise of an election is not a 'contract.']

Corporations sole

1615. Apart from statute or special custom, a corporation sole cannot acquire, and, therefore, cannot alienate, chattels corporeal in its corporate capacity.

Fulwood's Case (1591), 4 Rep., at 65 a, *per Curiam.*
Howley v. *Knight* (1849) 14 Q. B. 240 (bond).
Power v. *Banks* [1901] 2 Ch. 487.

Alienation by non compos, &c.

1616. The powers of alienation (if any) exercisable by an idiot,[a] a lunatic so found,[b] a person of

unsound mind (not being an idiot or a lunatic so found),[c] a drunken person,[d] a convict or the administrator or curator of his property,[e] and a trustee in bankruptcy (in respect of the property divisible among the creditors of the bankrupt),[f] in relation to chattels corporeal, are similar (*mutatis mutandis*) to the powers exerciseable by such persons in relation to land (*ante*, Bk. I, §§ 64–66, 69; Bk. III, Sect. VII, Tit. V).

(a) *Beverley's Case* (1603) 4 Rep., at 126 b.
(b) *Re Walker* [1905] 1 Ch. 160.
(c) *Molton* v. *Camroux* (1849) 4 Exch. 17.
(d) *Matthews* v. *Baxter* (1873) 42 L. J. Ex. 73. (This was contract; but the power to acquire and alienate chattels appears to depend on contractual capacity.)
(e) Forfeiture Act, 1870, ss. 9, 12, 25, 30.
Trustee Act, 1893, s. 48.
(f) Bankruptcy Act, 1883, s. 56 (1) (4).
Re Rose [1904] 2 Ch. 348; [1905] 1 Ch. 94.

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